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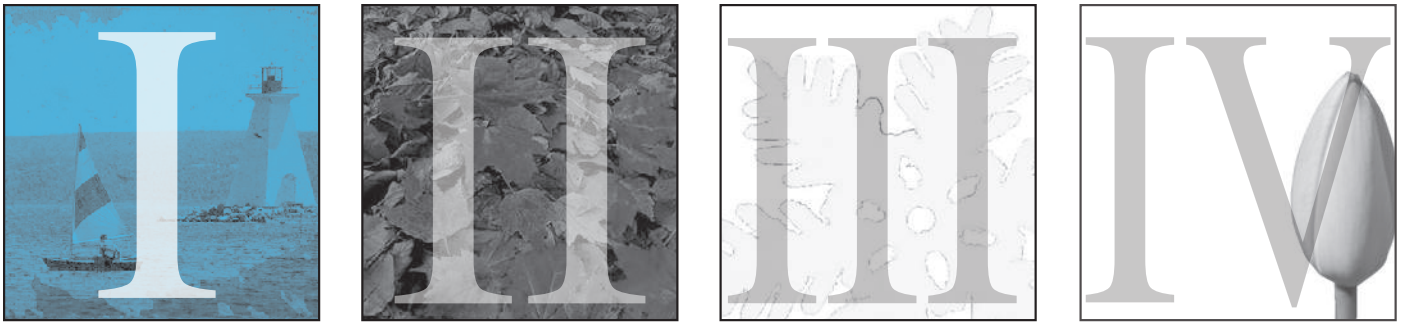

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President's Corner

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Richard W. Paul is a member of Dickinson Wright PLLC who focuses his practice on ADR, accountant liability litigation, automotive litigation, class actions, commercial and business litigation and product liability litigation.

Mr. Paul has served as an officer and Board member of the MDTC, Chair of the MDTC's Commercial Litigation Section, Chair of the MDTC's Annual and Winter Meetings, and was the 2013 recipient of the MDTC President's Special Recognition Award. He.is a former Chairperson of the State Bar of Michigan Litigation Section, is a Michigan State Court Administrative Office Approved Mediator and serves as a Case Evaluator in Wayne and Oakland Counties.

Mr. Paul is admitted to practice in Michigan, the U.S. District Courts for the Eastern and Western Districts of Michigan and the District of Columbia, the U.S. Sixth Circuit Court of Appeals, the U.S. Supreme Court and the U.S. Court of International Trade. Mr. Paul has also appeared *pro hac vice* in state courts throughout the country.

Mr. Paul is recognized in business and products liability litigation by *Michigan Super Lawyers*, *dbusiness Top Lawyers, Leading Lawyers--Michigan* and is rated A/V Preeminent by *Martindale-Hubbell*.

Mr. Paul received his A.B. degree *magna cum laude* from Dartmouth College and his J.D. degree from Boston College Law School.

From the President

"We have deep depth." --Yogi Berra

These words of my favorite American philosopher resonate and succinctly capture my sentiments about the MDTC as I begin my tenure as President. The MDTC is an engaged group of legal professionals throughout the State with a rich tradition and history, and I am honored to have been selected to lead the organization.

Our depth begins with our Executive Director **Madelyne Lawry** and her staff, including **Valerie Sowulewski** and **Joe Strother,** who work tirelessly to keep the MDTC running smoothly. This year's Officers--Vice President **Josh Richardson**, Treasurer **Irene Bruce Hathaway** and Secretary **Terry Durkin**--together with our Board of Directors--**Deborah Brouwer, Mike Conlon, Conor Dugan**, **Gary Eller, Mike Jolet, Rik Joppich, Vanessa McCamant, John Mucha, Dale Robinson, Angela Emmerling Shapiro, Carson Tucker** and **Paul Vance**--are committed to delivering value to our members, continuing our legacy and enhancing our reputation within the legal community.

Our depth extends to our Regional Chairs in Flint (**Barbara Hunyady)**, Grand Rapids (**Charles Pike)**, Lansing (**Mike Pattwell**), Marquette (**Jeremy Pickens**), Saginaw (**Drew Jordan**), Southeast Michigan (**Joe Richotte**) and Traverse City (**Matthew Cross**), as well as to our Section and Committee Chairs (**Robyn Brooks, Victoria Convertino, Mike Cook, Daniel Cortez, Graham Crabtree, Terry Durkin, Gary Eller, Jeremiah Fanslau, Daniel Ferris, Fred Fresard, Amber Girbach, Clifford Hammond, Catherine Hart, Kim Hillock, John Hohmeier, Nicholas Huguelet, Barbara Hunyady, Thomas Isaacs, Drew Jordan, Lee Khachaturian, Kevin Lesperance, Kari Melkonian, Brian Moore, Thaddeus Morgan, John Mucha, Robert Murkowski, Ridley Nimmo, David Ottenwess, Olivia Paglia, Mike Pattwell, Samantha Pattwell, Anthony Pignotti, Nathan Scherbarth, Tony Taweel and Beth Wittmann**), all of whom are dedicated to providing unparalleled educational and networking opportunities for our membership. More about our Sections, Committees and regional events can be found on our website at http://www.mdtc.org/About-Us.aspx and on our Facebook, Twitter and LinkedIn pages.

Yogi Berra also intoned that "if you don't know where you are going, you might wind up someplace else." That's certainly not the case for the coming year, as much is already in place thanks to the planning of our leadership teams. Just a few highlights:

- Our Board Meeting on September 21, 2017 at the Holiday Inn Express in Okemos with special guest Hon. Clinton Canady III of the Ingham County Circuit Court.
- Presentation of the MDTC and MAJ Respected Advocate Awards on September 27, 2017 at the State Bar of Michigan Meeting in Detroit. Each year the MDTC and MAJ present these awards to recognize and honor the respective defense and plaintiff's bar recipients' successful representation of clients and adherence to the highest standards of ethics. This year's recipients are MDTC member **J. Brian MacDonald** and MAJ member Ven Johnson.
- Our Past Presidents Dinner on November 9, 2017 at the Sheraton in Novi.

- Our 2017 Winter Meeting, "Law Practice—The Next Generation—Navigating Emerging Trends Changing the Practice of Law," on November 10, 2017 at the Sheraton in Novi.
- Our Annual Golf Outing on September 8, 2017 at the Mystic Creek Golf Club in Milford.
- Our second annual Legal Excellence Awards event at the Gem Theater in Detroit on March 8, 2018. In addition to presenting the Excellence in Defense Award, the Golden Gavel Award and the Judicial Award, we will present **John Jacobs** with the inaugural John P. Jacobs Appellate Advocacy Award. We welcome and solicit your nominations for the Excellence in Defense, Golden Gavel and Judicial Awards by October 2, 2017.
- Our Future Planning Meeting at the Detroit Crowne Plaza Riverfront on February 2-3, 2018.
- Our Southeast Region Reception at the Firebird Tavern in Detroit on February 2, 2018.
- Our Board Meeting at the Detroit Crowne Plaza Riverfront on February 3, 2018 with a Michigan Supreme Court Justice to be invited.
- Our Board Meeting at the Holiday Inn Express in Okemos on April 19, 2018 with a member of the Michigan judiciary to be invited.
- Our Annual Meeting at the Soaring Eagle Resort in Mt. Pleasant on May 10-11, 2018.
- Publishing our *MDTC Quarterly* and e-Newsletters with timely and informative articles as well as fun facts about our members and spotlights on the judiciary.
- Authoring our highly respected amicus briefs to the Michigan Supreme Court.
- Our continued social media presence on Facebook, LinkedIn and Twitter.

Yogi Berra further said that "you can observe a lot by just watching" and I am grateful to have learned the ropes from my accomplished predecessor, **Hilary Ballentine**. Hilary's vision, insights and dedication have been instrumental in ensuring the continued success of the MDTC. I look forward to continuing that success and adding to our depth when meeting and working with our members during the coming year.

MDTC E-Newsletter
Publication Schedule

Publication Date	Copy Deadline
December	November 1
March	February 1
June	May 1
September	August 1

For information on article requirements, please contact:

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Michigan Defense Quarterly
Publication Schedule

Publication Date	Copy Deadline
January	December 1
April	March 1
July	June 1
October	September 1

For information on article requirements, please contact:

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Do Not Be Deterred: Learning the High Art of Amicus Brief Writing

By: Lawrence S. Ebner

Executive Summary

There is an art to drafting effective amicus curiae briefs. Any attorney with good writing skills can produce a persuasive amicus brief. Following certain guidelines regarding style, format, and content will increase the chances that an amicus brief not only will be read by an appellate court, but also influence the court's thinking.

Lawrence S. Ebner is founder of Capital Appellate Advocacy PLLC, a Washington, D.C.-based appellate litigation boutique that focuses on federal issues in the Supreme Court and federal courts of appeals. Mr. Ebner is a Fellow of the American Academy of Appellate Lawyers and a graduate of Harvard Law School and Dartmouth College. He has written dozens of amicus briefs on behalf of industry groups and individual companies, and also for DRI. Mr. Ebner serves as chair of the DRI Amicus Committee and as publications chair of the DRI Appellate Advocacy Committee.

Crafting a persuasive amicus curiae brief is a high art. Just like conducting an effective cross-examination, or drafting a comprehensive set of interrogatories, there is a unique set of guidelines, skills, and techniques that every amicus brief author should master.

Keep It Short

At the Supreme Court, petition-stage amicus briefs are limited to 6,000 words and merit stage amicus briefs are limited to 9,000 words.[1] In the federal courts of appeals, the newly amended Federal Rules of Appellate Procedure limit amicus briefs to 6,500 words (unless modified by local circuit rules).[2]

Truly effective amicus briefs, however, often do not require that much word volume to make an impact. Shorter is better. Because amicus briefs supplement the parties' briefs (which usually do occupy most of their allotted word volume), a concise amicus brief has a better chance of getting read and considered. This is especially true in appeals in which more than one amicus brief has been filed.

Utilize the Interest of the Amicus Curiae Section to Engage the Court

Every amicus brief begins with a section entitled something like "Interest of the Amicus Curiae."[3] After glancing at the cover page and table of contents, the "Interest of the Amicus Curiae" section is usually what a member of the Court, or law clerks, read first. Unless the "Interest of the Amicus Curiae" section engages the reader, that may be the *only* part of the brief that he or she reads (amicus briefs frequently are filed on behalf of two or more amici curiae, in which case there will be an interest of the amici curiae section. For convenience, this article refers only to a single amicus curiae).

Inexperienced amicus brief writers sometimes make the mistake of limiting the interest of the amicus curiae section to a few sentences identifying or describing the amicus curiae in general terms. For example, if the amicus curiae is a trade association, a neophyte amicus counsel may think that it is sufficient to borrow a few sentences from the "About" page on the group's website and use that alone as the amicus brief's "Interest of the Amicus Curiae" section. While that might be an appropriate way to begin the Interest section, it is not enough.

Instead, as the name implies, the interest of the amicus curiae section should address exactly that subject: Why is this case, and/or the question presented, important to the amicus curiae and its members (and why should it be important to the Court)? What expertise, experience, or other background does the amicus curiae have in connection with the question presented and/or subject matter of the appeal? Has the amicus

curiae filed other briefs on the same issue or related subjects in the same or other courts? If there is more than one question presented, which specific legal issue or issues does the amicus brief address? What will the amicus brief add to the court's understanding or consideration of the issue or issues (e.g., a unique, broad, or practical perspective; insight on the policy implications; additional jurisprudential, legislative, regulatory, or scientific or regulatory background). What position does the amicus brief advocate?

An interest of the amicus curiae section drafted in this manner can quickly establish the credibility of the amicus curiae as well as draw the court into the brief. The converse is also true: if the interest of the amicus curiae section fails to provide adequate information as to why the amicus brief is being filed, it may not be read. Moreover, in some appellate courts, such as the US Court of Appeals for the Seventh Circuit, a motion for leave to file an amicus brief (when the unsupported party has withheld consent) may be denied.

Avoid Getting Bogged Down by the Facts of the Case

Writing an amicus brief can be a liberating experience. The brief can and should address the legal issues in an appeal, including their broader implications, without delving into the facts of the particular case in which the issues arise. No statement of facts is required, or desirable, in an amicus brief.[4] Although an amicus brief can be written at the "10,000-foot" or even "30,000-foot" level, it should not be totally oblivious to the facts of the case, especially when they squarely present a legal question or vividly illustrate the wisdom of a legal argument. Many amicus briefs weave a few factual and procedural background sentences into the "Interest of the Amicus Curiae" or "Summary of Argument" sections.

Stick to the Questions Presented

As a general rule, appellate courts will not consider legal issues that a party failed to raise and press in the lower courts, and thus preserve for appeal. Although it is permissible, and usually quite desirable, for an amicus curiae to present a new *argument* in connection with one of the questions presented, an amicus brief normally must avoid raising a legal issue that is not before the appellate court.

An interesting exception to this rule occurred in the case of *Dart Cherokee Basin Operating Co, LLC v Owens*, 135 S Ct 547; 190 L Ed 2d 495 (2014). In that case, which involved the evidentiary support needed to satisfy federal notice-of-removal requirements, the Supreme Court granted certiorari. DRI-The Voice of the Defense Bar filed a merits-stage amicus brief that aligned with the Court's ultimate decision on the merits. Another merits-stage amicus brief, filed by Public Citizen Litigation Group, argued that the notice-of-removal issue was not actually before the Court, and thus, that the Court lacked certiorari jurisdiction to consider that issue. Much of the hearing focused on that jurisdictional issue. In a 5–4 decision, over sharp dissents by Justices Scalia and Thomas, the Court retained jurisdiction and decided the notice-of-removal issue.

Do Not Repeat the Supported Party's Legal Arguments

In most cases, using your own words to reiterate the legal arguments that the supported party makes in its brief or petition will ensure that your amicus brief will be ignored. Even too much similarity between the argument headings in an amicus brief's table of contents and those in the supported party's brief or petition may be enough to relegate the amicus brief to the bottom of the pile. Take the Supreme Court's admonition to heart:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.[5]

There is an exception to the admonition against repeating a party's arguments: in a rare case in which the supported party's brief does a truly inadequate job of articulating an argument on a legal issue, it probably is okay for an amicus brief to provide the court with the well-researched and written, high-quality legal argument that the supported party's brief failed to present. Such an amicus brief presumably would fall into the category of providing an appellate court with "relevant matter not already brought to its attention by the parties."[6]

Avoiding repetition of a supported party's arguments does not mean that an amicus brief should shy away from digging deeper into an argument. An amicus brief, for example, could provide an in-depth discussion of case law that the supported party's brief merely cites. Or an amicus brief can augment or bolster a party's argument by referring to law review articles or other scholarly materials. If a case involves interpretation of a statute, an amicus brief might present relevant legislative history. And of course, an amicus brief has free rein to criticize a lower court's opinion or the legal arguments that the opposing party has made or can be anticipated to make.

An amicus brief also can provide *non-case-specific* factual information that may be helpful to an appellate court's understanding of the legal issues, their implications, or ramifications. Such extra-record factual information, which fits into the original notion of a "friend of the court," can range from historical background to economic or sociological statistics to engineering or scientific data.

In any event, do not submit a "me-too" amicus brief that replicates arguments contained in other briefs. This also applies to situations in which more than one amicus brief is being submitted. Coordinating various amicus briefs, or submitting a single brief on behalf of co-amici, helps avoid the problem of duplicative amicus briefs.

Write in an Elevated and Restrained Tone

Appellate briefs are, or at least should be, fundamentally different from trial court briefs. As an amicus counsel, you can be a strong advocate for your amicus client's

position without having to write a brief that is as confrontational or antagonistic, and even *ad hominem,* as many trial court briefs tend to be. An amicus brief can be written in a loftier style, and speak with authority, without adopting an erudite tone or reading like a law review article. The text should be as straightforward as possible. Keep sentences as short as possible, but do not use made-up acronyms. Vivid words and phrases can be used, but with care, and always in a way that is respectful to the judiciary and to the parties and their counsel. Remember that your amicus brief is directed to the questions presented, not to the litigating parties themselves.

The Office of the Solicitor General of the United States (OSG) is composed of outstanding appellate attorneys whose Supreme Court briefs provide aspirational examples of the appropriate writing style and tone for amicus curiae and other types of appellate briefs (note, however, that the OSG briefs have their own structural and citation formats).[7]

Edit, and Re-edit, Your Brief

There is no such thing as too much editing or proofreading of an amicus brief, even if you have to eat some billable time to do it. Be certain to know and respect an appellate court's format requirements. Adhere to Bluebook or other standard citation styles, including in the table of authorities. Limit the length of block quotes. Use "emphasis added" sparingly, and never use **bold font** to emphasize words or phrases (many appellate judges find bolding to be offensive). Keep footnotes short and to a minimum, and do not use a font size so small (e.g., 8-point Times New Roman) that footnotes will be virtually impossible to read by anyone who does not have 20-20 vision.

Do Not Allow the Supported Party or Its Counsel to Write Your Brief

Supreme Court Rule 37.6 requires the first footnote on the first page of every amicus brief filed in that Court to "indicate whether counsel for a party authored the brief in whole or in part." Amicus briefs filed in the federal courts of appeals must include the same disclosure.[8] The 2010 Advisory Committee Notes accompanying the federal appellate rule indicate that it "serves to deter counsel from using an amicus brief to circumvent page limits on parties' briefs." This does not mean, however, that a supported party's counsel should avoid contact with amicus counsel. To the contrary, party counsel's solicitation and coordination of amicus briefs, suggestions for topics, issues, or arguments, sharing of research materials, and commentary on near-final drafts, continue to be a common and desirable aspect of amicus brief practice. Indeed, the Advisory Committee Notes indicate that "coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments."

As a corollary, do not allow counsel for an opposing party to condition his or her consent to file an amicus brief on an opportunity to preview your brief. In the vast majority of cases, there is no justification for a party to withhold consent for the filing of a timely amicus brief in support of the other side. An opposing counsel's preapproval of the content of an amicus brief as a condition for consent is simply out of line in appellate courts, and it does not serve the interests of justice.

The "Amicus Machine" Should Not Deter You from Learning the High Art of Amicus Brief Writing

As mentioned above, writing an effective amicus brief is an art. Although it is a high art form that many appellate specialists have mastered, it would be too self-serving to suggest that only highly experienced appellate attorneys have the skill to write persuasive amicus briefs.

A recent law review article contends that at the Supreme Court level, a relatively small number of renown appellate advocates operate a self-perpetuating "amicus machine" that is both "clubby" and "elite."[9] The authors define the so-called amicus machine as "a systematic, choreographed engine designed by people in the know to get the Justices the information they crave, packaged by lawyers they trust."[10] Armed with statistics about the elite law firms that solicit and file many Supreme Court amicus briefs, the authors go so far as to assert that "the modern Supreme Court itself embraces the work of the amicus machine. The Justices seem to prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy."[11] The list of contributors whom the authors interviewed for their supposedly objective article reads like the membership roster of the exclusive club that the authors laud.

Most Supreme Court "repeat players" are truly stellar appellate advocates who deserve their well-earned reputations as outstanding, sought-after members of the Supreme Court Bar, especially in the area of oral advocacy. While those marquee-level attorneys appear as counsel of record on Supreme Court amicus briefs, it is typically their juniors who do the actual drafting (or at least initial drafting) of amicus briefs. Those less experienced but talented attorneys produce excellent work product. However, neither they nor their super-star colleagues have a monopoly on the ability to author high-impact amicus briefs. Instead, any dedicated attorney who wants to spend the time honing his or her writing skills at the appellate level can learn the art of drafting a persuasive amicus brief for submission to the Supreme Court, federal courts of appeals, or state appellate courts.

Endnotes

1. S Ct R 33(g) (table).
2. See FR App P 29(a)(5) & 32(a)(7)(B)(i).
3. See, *e.g.*, FR App P 29(a)(4)(D).
4. See, *e.g.*, FR App P 29(a)(4).
5. S Ct R 37.1.
6. *Id*.
7. OSG briefs are available online at https://www.justice.gov/osg/supreme-court-briefs.
8. *See* FR App P 29(a)(4)(E).
9. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va L Rev 1901, 1908 (2016).
10. *Id*. at 1915.
11. *Id*. at 1907.

Leadership Traits of United States Marines – Understanding and Developing Your Own "Gung Ho" Leadership Style

By Edward Perdue, Esq., *Dickinson Wright PLLC*

Executive Summary

Effective leadership involves the study and consideration of what it will take to move a particular group of people to accomplish a specific goal. While the qualities necessary to do these things with people are necessarily within all of us, leadership is not about polishing a resume or climbing the corporate ladder. Leadership is about the relationship between the leader and those being led and how to make that connection produce results on whatever field it is that you play or fight. Leadership traits taught to and instilled in the Marines can provide tools to legal practitioners to develop or hone their own effective and winning leadership style.

Edward Perdue is a member at Dickinson Wright PLLC's Grand Rapids, Michigan office. He is a service-disabled veteran and served as an artillery officer in the United States Marine Corps, including service as a forward observer and forward air controller in Northern Iraq with the 2nd Battalion, 8th Marine Regiment during the Persian Gulf War. Ed practices in the areas of complex commercial litigation, creditors' rights, real estate litigation, product liability and insurance defense. A former municipal prosecutor, Ed has extensive first chair trial experience and acts as lead counsel on matters pending throughout the nation. Dickinson Wright has six offices throughout Michigan, as well as offices in Washington D.C., Nashville, Phoenix, Toronto, Las Vegas/Reno, Lexington, Ft. Lauderdale, Austin, and Columbus, OH. Ed can be reached at eperdue@dickinsonwright.com or 616-336-1038.

Forward

This discussion is a study in leadership. Keep in mind at the outset that leadership is not solely about the individual. The phrase "Gung Ho," which is now associated with the Marine Corps as a whole, and which roughly translates to a zealous and enthusiastic attitude, is actually derived from the Chinese industrial cooperative concept of "Work Together - Work in Harmony." A Marine officer leading the 2nd Marine Raider Battalion during World War II learned about that concept and imparted it to his Marines so successfully that it was eventually adopted by the Marine Corps. Effective leadership involves the study and consideration of what it will take to move a particular group of people to accomplish a specific goal. While the qualities necessary to do these things with people are necessarily within you, leadership is not about polishing a resume or climbing the corporate ladder. It is about the relationship between the leader and those being led and how to make that connection produce results on whatever field it is that you play or fight.

On I-95, forty-five minutes south of Washington, DC, lies the expansive Marine Corps Base at Quantico, Virginia. In the summer, situated on a broad lowland swath of the Potomac River, Quantico's parade decks and sandy trails serve as a steamy setting for the Marine Corps' Officer Candidate School ("OCS"). Returning to Quantico for a change of command ceremony about ten years ago, my family and I ran into a platoon of candidates on the street - drenched in sweat, eyes wide with fear and stress, rushing to get from one training evolution to another. In the late 1980s, I had once been one of those candidates, serving six weeks at the "school" between my junior and senior years in college. In truth, OCS was more of a vetting process than an education. It consisted of six weeks of intense training and physical activity designed to push the limits of what stress people can endure, short of actually being placed in combat. The Marines wanted to ensure back then that whoever was leading its enlisted men and women were not wilting flowers and would be able to endure and function under the stress of combat. Many candidates did not make it through.

Throughout that process, woven in between forced marches and obstacle courses, was an intense course in small unit leadership. Those future officers were exposed both to the textbook concepts surrounding a study of leadership and the field techniques the Marine Corps had developed for executing missions. It was the latter which provided the context in which all those theoretical lessons in leadership would be put to the test. Candidates and other young Marines are taught what "metrics" or "facts" to analyze during the planning phase of an operation, what steps to go through in that planning phase, and how to issue an order in a succinct and organized manner (for Marines, the famous five paragraph order).

A few years removed from OCS after college, and after another six-month stint at Quantico for officers known as The Basic School, I found myself in a tent in Silopi, Turkey with the officers of Golf Company, Second Battalion, Eighth Marine Regiment. The company commander was Captain Christopher Mulholland, a veteran of Beirut. The evening before our battalion would make an assault across the Tigris River into Northern Iraq against an entrenched enemy, we met in a tent to plan the next day's assault. We progressed through the now familiar planning process as if it were any other exercise. Knotty issues (such as the newly changed rules of engagement that prohibited us from firing on the enemy until fired upon) were addressed and dealt with. Timelines were adjusted in the field in Iraq when what looked like hills on the map turned out to be small mountains on the ground (the fast-paced ascent we envisioned became a two-day climb in the face of the enemy). In the end, the Marine Corps leadership system worked, both in our 200-man company and across the entire battlefield. In our sector, the enemy "beat feet" without ever firing a shot when we were within shooting distance and the mission was accomplished without the loss of American life.

Just as we typically dedicate a portion of our time to developing business, a segment of our professional life should be dedicated to improving our base of knowledge related to our profession.

Marine Corps Leadership Traits

The Marine Corps has codified those intangible elements of character and disposition, which it calls the "Leadership Traits." There is, of course, a military acronym designed to help Marines learn these traits: JJDIDTIEBUCKLE. That stands for the following: **J**ustice, **J**udgment, **D**ependability, **I**nitiative, **D**ecisiveness, **T**act, **I**ntegrity, **E**ndurance, **B**earing, **U**nselfishness, **C**ourage, **K**nowledge, **L**oyalty and **E**nthusiasm. Each will be addressed separately here, first by summarizing what each trait means to Marines, and then by discussing how these may apply in other contexts.[1]

1. Justice.

Because Marines often work in hostile environments and hectic conditions, it is all that more important for them to be able to rely upon a settled sense of order. It is imperative for unit harmony and cohesion that there not be seething personal disputes or disgruntled subordinates within the group. It is therefore critical that punishments, rewards, opportunities and assignments be distributed fairly, impartially, and consistently.

There is really no extrapolation required to see the application of this concept to your business or practice. Properly motivated subordinates are typically willing to work hard and get the job done, but they want to know that their efforts will be rewarded, that there is no favoritism at work in the organization, and that the goalposts are not constantly being moved. People respond well when they know they are being treated fairly and getting a fair shake. Even when they have erred in some fashion, they should be reprimanded through constructive counseling, which applies even standards to the conduct at issue. Further, all those engaging in the prohibited or erroneous conduct need to receive the same treatment. The counseling process, properly handled, can itself be a rewarding and performance-enhancing exercise. Finally, never underestimate the power of recognition and rewards for jobs well done. Napoleon developed the modern practice of awarding medals for conspicuous conduct and he felt that he could move mountains with "a bit of colored ribbon."[2]

2. Judgment.

Judgment is one's ability to think about things clearly, calmly, and in an orderly fashion. Judgment can be improved by avoiding knee-jerk reactions, acting impulsively, or making rash decisions. Marines counsel approaching problems with a common-sense attitude and generally follow some reasoned thought process to arrive at a well-considered decision. Remember that in the context of war-fighting, Marines must remain cognizant of the mission at all times, and all other considerations must be subordinated to accomplishing that mission.

In the civilian context we can again see the direct applicability of these concepts. When acting as leaders, we must maintain an even-keeled approach to problems. Even in emotionally charged situations, leaders do not have the luxury of venting or lashing out. There are larger issues at stake than a leader's personal feelings, and they need to be able to separate their egos from the greater good of the team. When it is time to analyze a situation and choose a course of action, leaders must ensure that they do so in a pragmatic, principled and reasoned way. Exercising judgment also involves exercising one's power in an even-handed manner – channeling your inner Solomon. If there is going to be a weekend "working trip" to the Hamptons, then everyone should be invited. If it is wrong for one person to expense a limousine on a business trip, then that should be verboten for all. If Jane is going to get rewarded for staying late, then so should Jack.

3. Dependability.

Dependability simply means that you can be counted on to get the job done. A Marine leader makes solutions, not excuses. Marine leaders are where they need to be, when they need to be there, and they have their "stuff" together. Dependability also involves carrying out lawful orders and accomplishing the mission, even if you do not agree with it. Marines work within the system to effect change if they feel an approach is wrong or misguided, but once a decision is made they are all in for the win and will execute their duties with the highest standards of performance.

Are there things that we can do as civilian leaders to improve our own dependability? There should be. Consider whether there are systems in place in your life to ensure that you are at work on time, or even the first at work. Can you be

counted on to chip in or provide support when people need to stay late, or are you one of those superiors who walk out and expect the troops to have the work done in the morning? Do you complain and sulk if your proposal was disregarded in favor of someone else's? Can you be expected to make every effort to carry out initiatives which you may not necessarily agree with? Are you the type of leader who accepts, or even seeks out, unpleasant work because getting it done is the right thing to do for the organization? If you answered "no" to any of these questions, and it would be hard not to, there may be room for personal improvement on this front.

4. Initiative.

Initiative involves doing what needs to be done without being told to do it. It also encompasses improvising and acting resourcefully in situations where your normal tools or methods are unavailable to you. Marines are taught to expect the unexpected, and when it arrives, Marines do not cower in the corner – they take on the unforeseen challenge and deliver solutions. Every Marine is taught to be a leader. Remember that wherever there are two Marines, one of them is in charge. There are going to be times when officers or non-commissioned officers are down or unavailable, but decisions still need to be made. Marines understand that it is their duty when that occurs to step up and undertake what needs to be done to accomplish the mission.

Taking the initiative in our civilian careers sets us apart from our peers. How often do we hear the disappointing mantra that a particular task is not in someone's job description? Leaders don't care about job descriptions or CYA, they get things done. When we start thinking about ourselves as "fixers" and people that make things happen, we are starting to think like leaders. People will take notice. Leadership, however, is exercised as much in the dark as in the light of day.

Leaders are those who find solutions to problems. They do not just shoot down other people's ideas; they adapt and overcome whatever obstacles they see in the path to meeting their objective. When you get out there and demonstrate that you are motivated and ready to get the job done, torpedoes be damned, then you are coming into your own as a leader.

5. Decisiveness.

The worst decision is indecision. Here is what the Non-Commissioned Officer Handbook tells young Marine leaders about this concept: "Make sound and timely decisions. To make a sound decision, you should know the mission, what you are capable of doing to accomplish it, what means you have to accomplish it, and what possible impediments or obstacles exist (in combat these would be enemy capabilities) that might stand in the way. Timeliness is as important as soundness. In many military situations, a timely, though inferior, decision is better than a long-delayed, theoretically correct, decision."[3]

As I personally learned many times as a young Officer Candidate, and later as a Second Lieutenant in the forests of Quantico, Marine leaders must avoid what is known as "analysis paralysis." Marines now speak in terms of a "70% Solution" which means that once about 70% of the possible analysis of a situation is completed, a Marine leader should feel sufficiently confident to develop and execute a plan of action. This message was driven home on many occasions in Quantico by Marine instructors in my face asking "What are you going to do, Lieutenant? Time is ticking - you have to make a decision." At the end of the day, Marines rightly believe that a good decision executed soon is 100% better than a perfect decision executed later.

We live in a new digital age. Many of our processes and systems allow for accelerated decision making. We, and our competitors and adversaries, have the ability to access and assemble information at speeds that were never possible before. We now have access to infinite knowledge in our cell phones. As a result, decision making tempo becomes an even more important weapon in your business or practice. The truth about any conflict scenario is that even the best laid plans typically do not survive the first contact with the enemy or adversary. There is always going to be a need to adapt, improvise and overcome difficulties in the course of executing a plan. In light of that, the 70% Solution approach makes as much sense in the civilian world as it does in the military context. Modern leaders will do well to quickly assemble all reasonably obtainable information, process and analyze that information, and then engage the decision making steps touched on above to quickly enact a good and timely plan. That approach will typically generate more productive results than waiting until an exhaustive review of all options is undertaken.

6. Tact.

Marines are taught that when leading, sometimes how they say things is as important as what they say. They must consider the context and the audience, and then attempt to communicate in a manner that should not offend reasonable people. Marines believe in being firm but also polite and courteous. Avoiding angering team members is conducive to accomplishing the mission, and the golden rule of treating others as a Marine would want to be treated is good to remember.

Whatever the common goal is that we want to achieve in the civilian world, it is infinitely easier to accomplish with a relatively happy and harmonious team than it is with a group of individuals harboring resentments or hurt feelings. Hyperbole, hysterics, foul language and shouting should be avoided at all costs. Outside the context of an emergent situation, it is difficult to conceive of something that needs to be said that cannot be communicated in a calm and professional manner.

7. Integrity.

There is nothing more important to earning the trust of Marines than acting with integrity. Marines often say that it is the cornerstone of leadership. It means being honest and truthful at all times, even when no one is watching. Integrity equates to a Marine's honor, and irrespective of what else is taken away from a Marine – her treasure, her freedom, even her life – she alone controls whether her integrity remains intact.

It is not always easy to do the right thing, especially when no one else is watching. There is cash register honesty, and then there is honesty at tax time, and we have to strive to be honest in both. One's integrity shines through and is visible to those we lead. It is also important to maintain for our own self-worth. The short version of the Lawyer's Prayer of St. Thomas More comes to mind: "Lord, let me be able in argument, accurate in analysis, correct in conclusion, candid with my clients and honest with my adversaries. Stand beside me in court so that I will not, in order to win a point, lose my soul."

8. Endurance.

Digging deep for the will to carry on in the face of hardship is expected of Marines. It involves the physical and mental stamina needed to withstand pain, fatigue and stress. Marine leaders do not just find that in themselves, they find it in others. Marine leaders are able to convince those Marines with them experiencing the same hardships that they too have what it takes to survive and win. Marines lead by example.

Living this concept involves being able to deal with and thrive under difficult and stressful conditions. When it is time to stay overnight to meet a deadline, true leaders will roll up their sleeves, call the sitter, and show the way it is going to get done. Setting the example in such situations, whether it is putting in the long hours or making the dreaded cross-country sales call, is what the leader should be doing. You must also believe that you can achieve more than what you think is possible. When you believe you can achieve the unexpected, others will believe it, too. As they say in the Corps, when talking about enduring hardships in the course of getting the job done, it is mind over matter: " if you don't mind, it don't matter."

9. Bearing.

Bearing involves the way Marines conduct and carry themselves. From the day they earn the title "Marine," they are expected to act in line with the highest soldierly and ethical conduct. Their manner should reflect confidence, competence and control.

There is value in our civilian lives to maintaining a soldierly bearing. We always want to maintain self-control and instill confidence in our subordinates. Do "Chicken Littles" who cry that the sky is falling whenever they encounter difficulties instill confidence in others? That kind of defeatist attitude does not demonstrate leadership and does not help accomplish the common goal. Especially in tough times, successful leaders remain calm and maintain a stiff upper lip. Subordinates look to their leaders in stressful situations, and they are more likely to follow directions and perform well when their team leader is calmly working the problem and exuding a sense of confidence.

10. Unselfishness.

Joining the Marine Corps is itself a selfless act. But beyond that, Marines are committed to a "team first" mentality. Marine leaders look out for the welfare of their Marines before looking to their own. They avoid making themselves comfortable at the expense of others. At all times, Marine leaders advance the interests of the mission and their team before any personal considerations. A common demonstration of this mentality is that the lowest-ranking Marines eat first and the highest-ranking officers or non-commissioned officers present eat last.

In our professions, we exhibit leadership when we avoid using our positions or titles for personal gain at the expense of others. While we will not often experience a chow line and have the opportunity to eat last, there are certainly other opportunities to put the interests of our subordinates above our own. Ensure your team members have the same tools and resources that you have access to. Give credit to your team members and the team as a whole when credit is due. In short, think less about elevating yourself and more about elevating others.

11. Courage.

Courage can be defined many ways. People sometimes equate courage with being fearless. In reality, true courage is not the absence of fear. Rather, courage is being cognizant of both one's duty and one's natural fear (of death or injury in combat as examples), and despite that fear and apprehension, doing one's duty in spite of it.

Examples of courage in our workplace is abundant. It can be standing up to a superior when they are wrong or eschewing the easy road in favor of a more challenging ethical or problematic course. Moral courage can mean doing the right thing or standing up for what is right, even though you know it is going to negatively affect you. Pushing through our fears and doing our duty demonstrates courage in the workplace. Having the intestinal fortitude to practice our craft (whatever that may be) in a principled and ethical manner, despite temptations to do otherwise, exhibits courage. Taking on new or difficult challenges despite the fear of failure is another example. Always standing up for what is right and good, and doing what is hard because the "hard" is what makes things great, is the personification of courage.

12. Knowledge.

The Marine Corps expects its leaders to be knowledgeable about their warfighting craft. Infantry platoon leaders, for example, are expected to know how to effectively operate each weapon system in their platoon. They are also expected to have a working knowledge of skills typically performed by others, such as having the ability to call in artillery or air support. More deeply, Marine officers are also expected to have a foundational knowledge of the principles of war and modern tactics – knowledge that should indirectly guide and color their decision making, even subconsciously in stressful and high-intensity environments. Marines are also expected to continue their military education at every level. There are numerous courses and written workshops for every level of Marine leader, and various schools are found within the Marine Corps University at Quantico. For officers, these include the Marine Corps War College, the School of Advanced War Fighting, and the Marine Corps Command and Staff College. The Marine Corps takes the continuing education of its leaders very seriously

and provides them every opportunity to further develop their base of knowledge.

In our civilian positions, we should also strive to become supremely knowledgeable about our particular craft. Just as we typically dedicate a portion of our time to developing business, a segment of our professional life should be dedicated to improving our base of knowledge related to our profession. Leaders are constantly reading literature applicable to their industry. Yet, reading should not be limited to traditional trade publications. There are endless fields of study which, while not directly related to our particular profession, can provide new insight and differing perspectives on how to approach our day-to-day business. Our subordinates deserve leaders with that kind of intellectual curiosity. They also appreciate that their superior is a thoughtful leader and is seeking to provide new and creative ways to improve performance or solve problems. So be prepared by knowing what you are expected to know, and learning what you are not expected to know. Let all that knowledge wash over your decision making and do not be afraid to reference the source of your inspiration where appropriate. Finally, encourage your people to develop their own base of knowledge through suggested reading lists or by making seminars or other educational opportunities available to them.

13. Loyalty.

The Marine Corps Motto, *Semper Fidelis* – Always Faithful – is the embodiment of this principle for Marines. First and foremost, Marines are dedicated to each other. When they fight, they fight side by side and are committed to accomplishing their mission without compromising their devotion to each other's welfare. It is also very much engrained in each Marine that he is not to leave another Marine behind on the battlefield, and the knowledge that he or she will not be left behind is a powerful motivator when they are asked to place themselves in harm's way. Their loyalty also runs up and down the chain of command. Marines endeavor to be loyal to their subordinates, peers and commanders as well. Sometimes, one's loyalties require prioritization. Before I had a family, this Marine's priorities were God, Corps, Country (in that order).

How do we express and demonstrate loyalty in our profession? One way is to never publicly criticize our organization or management, or to discuss our internal problems with outsiders. Even when we disagree with decisions, we carry those out to the fullest of our ability as if we had made them ourselves. We work the system to effect change from the inside. Civilian leaders also recognize the accomplishments of their subordinates and share success. They also willingly shoulder responsibility for failure, and accept responsibility for poor performance by the group. Effective leaders avoid throwing their subordinates under the bus and they do not take sole credit for team performance. Ultimately, loyalty and many of the other leadership traits go hand in hand. Are we part of something bigger than ourselves and are we committed to achieving a good greater than personal gain or advancement? How we demonstrate that loyalty goes a long way in defining for our team members how competent of a leader we are.

14. Enthusiasm.

Marines understand that enthusiasm is contagious. Demonstrating an honest interest and belief in one's mission helps motivate others to accomplish that same mission. Marines believe that any task assigned to them is worth doing right and with *esprit de corps*. By understanding their mission, and coming to believe in its accomplishment, Marine leaders transfer that belief into their teams, thereby making accomplishment of the mission more likely.

Our professional duties can sometimes be unpleasant and tiresome. But understanding why they need to be done, and communicating that understanding, helps our civilian teams understand their goals and make their achievement more possible. Nobody likes a "Debbie Downer," and those kinds of people do not motivate others. Leaders do what they need to do to pump themselves up about their obligations so they can pass that excitement and desire to succeed along to their teams. Working together, embracing hardships and overcoming obstacles all create a gung-ho mentality and not only help accomplish your goal, but foster unit morale and cohesion.

CONCLUSION

Having explored the Marine Corps Leadership Traits and their applicability to our civilian professions, where do we go from here? The reality is that leadership is difficult to define, and it means different things to different people. An apt definition is that leadership is the art of focusing the efforts and talents of a group of people toward the achievement of a common goal. Note that I define "leadership" as an art and not a science. There is no precise formula for leading people effectively, and what it means to lead cannot be fully captured by pen and paper. Leadership qualities cannot be artificially instilled in others. Nevertheless, everyone has innate qualities and characteristics that can be molded into an individually suited leadership style. So while leadership cannot be given, it can be taught, nurtured and developed.

Endnotes

1 Sources generally relied upon but not necessarily quoted herein include the USMC Leadership Handbook ("NCO Handbook") available at www.6mcd.usmc.mil/ftl_site/Handbook/marine_corps_leadership_traits.htm; *Leading Marines,* MCWP 6-11 (formerly FMFM 1-0) available at http://www.marines.mil/Portals/59/Publications/MCWP%206-11%20Leading%20Marine.pdf; *Marine Leadership Traits* from Marines.com, available at www.marines.com/being-a-marine/leadership, and Cpl. Beddoe, 07/19/13 Texas Devildog, *"Backbone" USMC Leadership Traits – JJDIDTIEBUCKLE,* available at www.txdevildog.com/backbone-usmc-leadership-traits-jjdidtiebuckle/.

2 Full quote: "A soldier will fight long and hard for a bit of colored ribbon."

3 NCO Handbook, *supra* at n 1.

How to Tame the Reptile

By: Kimberlee A. Hillock, *Willingham & Coté, P.C.*

Executive Summary

On November 11, 2016, Jill Bechtold, along with Marks Gray, P.A., and Catherine Groll, from Farm Bureau, gave a presentation at the MDTC 2016 Winter Meeting regarding how to tame the reptile. While most of us have attended seminars and know what the reptile is, this presentation did more than explain the theory. It provided helpful hints on how to stomp the reptile out of existence. Afterward, Judges Daniel Hathaway, Lita Popke, and David Allen answered questions regarding the judicial perspective on the reptile. Although you may not be able to avoid the reptile, there are several ways to handle this strategy before, and at, trial.

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Some defense attorneys may have been "reptiled" and may not realize it. In case there are those who are unfamiliar with the reptile, it is a trial strategy that manipulates the jury to consider not the facts of the case, but rather, the impact that the case could have on themselves and the community, very similar to "golden rule" and "community conscience" arguments. The reptile strategy focuses on the defendant's conduct, and how much harm it could have caused rather than focusing on the plaintiff's injuries. The reptile, however, is more than just an argument: it pervades the entire case, from client intake, to pleadings, written discovery, depositions, voir dire, opening statements, witness questioning, and closing statements.

A defense attorney's best strategy is (a) to recognize the reptile, (b) prepare the client for the reptile, and (c) object early and often through motion practice. If one waits until the motion in limine stage, it will be too late.

(a) Recognize the Reptile:

The first sign of the reptile may be the plaintiff's newly created "safety rules" (one must select the safest available choice) rather than the actual liability standard (one must use an acceptable and appropriate choice as recognized by reasonably prudent similar providers). Look for statements such as "needlessly endanger," or for absolute pronouncements such as "must" and "must not" i.e., "a driver must obey the speed limit." Look for questions mentioning "responsibility," "safety rule," or "required." The focus will not be on the defendant's legal duty, but on this safety rule and the harm that could result, for example:

- Please admit a driver must not needlessly endanger other drivers.
- Please admit that a driver must obey the speed limit.
- Please admit that speed limits are established to keep drivers safe.
- Please admit that speeding can cause auto accidents.
- Please admit that auto accidents can result in death.
- Please admit that auto accidents could kill children, parents, and puppies.

Look for questions focusing on the defendant's post-accident actions, such as, "did the defendant accept responsibility and feel bad?" Look for questions focusing on aspects of the defendant's job, i.e., "a trucker's job is to maintain a safe distance from the vehicle in front of him." The most frequently used buzz words to watch for are:

- Needlessly endanger
- Duty to provide a safe environment
- Safety rules
- Important

- Required
- Fair (pertaining to insurance claim handling)

The questions work because they are hard to deny, they are clear and not full of legal jargon, and they focus on safety—an easy concept for jurors to grasp.

(b) Prepare the Client for the Reptile:

There are several things you can do to help prepare your client in dealing with the reptile theory:

- Make sure the client understands the reptile strategy.
- Make sure the client understands the correct scope of duty.
- Warn client not to become emotional during deposition, especially if deposition is videotaped.
- Help your client develop standard responses to reptile questions, i.e.,
  - If fair means following the statutory provisions in the no-fault act, then yes, I follow the statutory provisions.
  - IThere are no such things as safety rules in this industry.
  - II follow the standard of care.
  - IThis industry follows X guidelines as was done in this case.
- Make sure your client is aware that plaintiff's counsel will ask the same questions until the desired response is received, and not to give in. One response might be: "I have already answered that question, and I don't have anything to add to my previous answer."
- Warn your client to listen carefully to mischaracterization of his or her testimony.
- Consider having client review a deposition transcript by the plaintiff attorney. If the client is asked what was reviewed in preparation for the deposition, the client should be prepared to say "I reviewed a deposition transcript of you and the reptile questions asked."

(c) Object Early and Often Through Motion Practice:

Object to requests for admission and file a motion for protective order under MCR 2.302(C)(4) (that certain matters not be inquired into because they do not pertain to the correct legal standard). Be prepared to cite provisions in the book, *Reptile, The 2009 Manual of the Plaintiff's Revolution*, by David Ball and Don Keenan. Consider pages 31, 62, 65, 66, and 248.

File a motion for protective order before depositions on the same basis. The motions will most likely be denied. Use it as an opportunity to educate the judge on the Reptile book and strategy, and to prepare the judge for later motions in limine. Once one witness has been deposed and there is proof of the reptile strategy, file another motion for protective order before any additional witnesses are deposed, and show proof of the strategy being used.

Object often during the depositions (form, relevance, lack of foundation, mischaracterization of law, speculative, argumentative, calls for legal conclusion, or even, simply, "reptile"). Do not rely on a standing objection. Consider instructing the client not to answer or perhaps even stopping the deposition. If opposing counsel is well-versed in the reptile badgering technique, consider videotaping the deposition or asking the court for a discovery master. Offer to pay costs up front, but reserve the right to request that costs be assessed against plaintiff if the court finds discovery abuses.

Next, you should file motions in limine. In a motion in limine, argue that "Golden Rule" strategies are inappropriate. Argue that such lines of questioning are irrelevant and prejudicial because they seek only emotional and sympathetic responses unrelated to duty or the elements of a negligence claim. Argue that "community safety" deflects the focus from the plaintiff's damages to larger community damage, which is not a proper consideration for compensatory damages. Argue that the buzz words used by plaintiff's counsel are not relevant to any element in the cause of action, and that they serve only to confuse and mislead the jurors. Cases such as *Gilbert v DaimlerChrysler,* 470 Mich 479; 685 NW2d 391 (2004), which condemn the practice of "inflaming the jury," are excellent cases to cite to in support of your argument. Argue that such "Golden Rule" standards are contrary to the applicable law on duty. Argue that the scope of duty and the elements of a cause of action are legal issues determined by the court, not by the jury. Make sure to state exactly what relief you want. Examples of relief include: exclusion of statements or questions pertaining to safety, community safety, safety rules, needless endangerment, and so on, during voir dire, opening arguments, closing arguments, and/or witness examinations. Consider asking the court to give the applicable standard of care in the initial instructions to the jury rather than at the end of the case (or maybe give during both).

Finally, **appeal**. If you have followed all the steps in this article, and the trial court rules against you, then appeal. There is almost no appellate law pertaining to the reptile. It is a vicious Catch-22. Without appellate law on the issue, it is difficult to win at the trial court level. But unless the issues are preserved at the trial court level (objections made, motions for protective orders filed, motions in limine filed, etc.), the issues cannot be won on appeal. Therefore, it is important to take steps at the trial court level to deal with the reptile strategy.

"Welcome to the United States! Passport, attorney-client information, and trade secrets, please."

By: Nicholas Huguelet and Deborah Brouwer, *Nemeth Law, P.C.*

Executive Summary

Homeland Security can search all items entering the United States – including your electronic devices. Designed primarily for cash smuggling and child pornography interdiction, these searches raise questions of how attorneys and employers can protect sensitive information. While reasonable suspicion is required before searching privileged information, it is not required before searching non-privileged trade secrets. Nevertheless, attorneys and employers can take steps to protect sensitive information at the border.

Nicholas Huguelet practices in labor and employment law and has represented clients before federal and state courts, administrative agencies and arbitrators in both Michigan and Ohio. He has experience representing and counseling both private and public sector clients in collective bargaining, employment disputes and statutory and regulatory compliance.

Deborah Brouwer practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals.

Sidd Bikkannavar, an American citizen and NASA engineer, sat in a United States Customs and Border Protection (CBP) holding room after returning to the United States from a trip to the Patagonian deserts where he raced solar-powered cars. Sidd is "a seasoned international traveler" who has undergone additional background testing for the Global Entry program intended to expedite his entry into the country. He has been an engineer with NASA's Jet Propulsion Laboratory (JPL) for the past ten years, most recently working on optics technology for the James Webb Space Telescope, which launches next year.

Like many of us, Sidd did not want to leave his work too far behind, so he took his NASA-provided cell phone on vacation with him. When he received the phone, Sidd recalls, he was told not to allow anyone access to it under any circumstances. At the US port of entry, Customs and Border Protection took Sidd to a holding room and demanded his phone and access PIN. Sidd protested, arguing that it was a government work phone and that he could not permit anyone access. He even flipped the phone over and showed the CBP agent the JPL barcode on the back. The agent insisted he had the authority to search the phone regardless. After some time, Sidd relented and handed over the phone and the access code. The CBP officer left the holding room with the unlocked phone, and was gone for thirty minutes. Sidd was not told what CBP looked at, whether anything was copied and retained, or who searched the device. When he got the phone back, Sidd shut it off for later analysis by the JPL IT department (needless to say, JPL's cybersecurity team was not too happy about the breach).[1]

The scary part of this encounter is that the CBP agent was right: CBP *does* have the authority to search your and your employees' phones and other electronic devices when seeking re-entry to the country. While our clients may not be carrying around the secrets of the American space program, this encounter does raise questions of how far CBP can go in searching devices and how we can protect privileged and confidential information.

CBP Authority to Search Electronic Devices

Border searches have long been exempt from the "probable cause" search requirements of the Fourth Amendment.[2] Absent this constitutional protection, Congress legislated and the Department of Homeland Security regulated. CBP now claims the authority to search "[a]ll persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof…."[3] Under this authority, CBP and Immigration and Customs Enforcement (ICE) have issued directives on border searches of electronic devices, with the stated goal of preventing terrorism, money laundering, child pornography, trade secret violations, human and bulk cash smuggling, contraband, and export control violations. As much as law-abiding individuals may dislike having

a federal agent rifle through their private messages and photos, electronic device searches have had some success.[4]

Under these directives, an agent "may examine electronic devices and may review and analyze the information encountered at the border…."[5] Absent unspecified "operational considerations that make it inappropriate," the searches are supposed to be conducted in the presence of the individual carrying the device.[6] This, however, does not mean that the individual will be able to witness the search itself.[7] Generally, even if CBP permits you to remain in the room with the device, you will not be able to see what information is being accessed.

The information collected from your device will not necessarily stay with CBP and ICE either. The directive permits CBP to share the information it obtains with other "federal, state, local, and foreign law enforcement agencies to the extent consistent with applicable law and policy."[8] CBP may also share your information with other federal agencies to obtain necessary technical assistance, such as if the data is encrypted or in a foreign language.[9] If your information is shared for this reason, CBP will notify you unless "notification would be contrary to national security or law enforcement or other operational interests."[10]

If CBP becomes aware of attorney-client privileged information, trade secrets, or other confidential information, the search does not end but special handling procedures do apply.[11] To search attorney-client privileged information, the CBP officer must "suspect[] that the content of such … material may constitute evidence of a crime" and must seek advice from Associate/Assistant Chief Counsel before searching the material.[12] Unlike other types of information, suspicion is required before attorney-client privileged information may be searched.

Confidential, but non-privileged, information is afforded somewhat less protection. The directive merely requires that CBP treat the information in accordance with the Trade Secrets Act, Privacy Act, or other laws or policies that might restrict the handling of the information.[13] The CBP officer need not, however, form any suspicion of criminal activity before searching confidential non-privileged information.

Any devices searched may be detained by CBP for a "brief, reasonable period of time" usually not exceeding five days.[14] Information obtained from a search may be retained by CBP only if it is "evidence of or is the fruit of a crime that CBP is authorized to enforce."[15] Otherwise, CBP will destroy the information.

Challenges to the Directive

The CBP and ICE directives have been challenged many times since CBP and ICE promulgated them. While courts have strong opinions about whether the searches *should* be done, the courts, for the most part, agree that the searches *can* be done. When analyzing the issue, courts generally fall into one of two categories: (1) mobile devices are viewed as any other piece of luggage that can be loaded or unloaded at will by the person carrying it, or (2) mobile devices are viewed as something that carries information about almost every aspect of a person's life, which most people do not possess the requisit skill, knowledge, or technical experience to effectively unpack. In reaching the conclusion that border agents have a right to search electronic devices, the Southern District of New York analogized laptop computers to other closed containers, such as luggage.[16] The Eastern District of New York simplified the matter even further by comparing electronic devices to "luggage, briefcases, and even clothing worn by a person entering the United States…."[17] The court further advised that "the sensible advice to all travelers is to 'think twice about the information you carry on your laptop,' and to ask themselves: 'Is it really necessary to have so much information accessible to you on your computer?'"[18] Given the likelihood that the devices would be searched by either CBP or foreign border patrol agents, the court placed blame for any unwanted data inspections on the traveler. In the court's words, "[t]his is enough to suggest that it would be foolish, if not irresponsible, for [travelers] to store truly private or confidential information on electronic devices that are carried and used overseas."[19]

Other courts have recognized, though, that it is impractical – if not impossible – for the average traveler to unpack unwanted data from a device before leaving the country. Even deleting unwanted data may not completely remove it from a device. The Ninth Circuit highlighted the distinction between traditional luggage and electronic devices by reasoning that:

> [w]hen packing traditional luggage, one is accustomed to deciding what papers to take and what to leave behind. When carrying a laptop, tablet or other device, however, removing files unnecessary to an impending trip is an impractical solution given the volume and often intermingled nature of the files. It is also a time-consuming task that may not even effectively erase the files.[20]

Noting that the incriminating data involved in that case was found only through forensic examination of the unallocated space on the defendant's hard drive (occupied only by previously deleted data that had not yet been overwritten), the Ninth Circuit continued its analogy, "[i]t is as if a search of a person's suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried."[21] Given the extensive forensic examination of the defendant's laptop there, the Ninth Circuit called the actions of the border patrol "essentially a computer strip search."[22] Nevertheless, the court upheld the search, creating two separate standards, depending on the extensiveness of the search. A manual, cursory review of an electronic device conducted at a border (or its functional equivalent) may be done without suspicion. If CBP desires to conduct a computer forensic examination, however, there must exist reasonable suspicion of a crime.[23] This reasonable suspicion standard lives only in the Ninth Circuit, and was a concept laughed off by the Eastern District of New York, which surmised that "Plaintiffs must be drinking the Kool-Aid if they think that a reasonable suspicion threshold of this kind will enable them to guarantee

confidentiality."[24] Whether they compare electronic devices to luggage or recognize their ability to reveal "privacies of life," courts routinely uphold the search.[25]

Authority to Compel Travelers' Passwords

While it's fairly clear that CBP has the right to demand that travelers turn over electronic devices for inspection, the question remains: Did Sidd have to tell the agents the PIN to access his phone, or could he have just handed it over while refusing to unlock it? CBP, of course, answers that it does have the authority to compel travelers to reveal their passwords, citing a federal statute that provides "[e]very customs officer shall…have the authority to demand the assistance of any person in making any arrest, search, or seizure authorized by any law enforced or administered by customs officers, if such assistance may be necessary."[26] The "assistance" CBP requires is the password to your phone and a refusal to "assist" is a misdemeanor. On the other hand, courts have held that passwords (as opposed to fingerprint scanners) are protected by the Fifth Amendment's privilege against self-incrimination.[27] As of yet, however, there are no court decisions one way or the other regarding whether travelers must provide their passwords at the border. Regardless, US citizens are permitted to enter the country whether or not they reveal their passwords, possibly after being held and questioned for a period of time if they refuse. CBP may, however, detain the device while trying to access it through more sophisticated methods.

Maintaining Trade Secret Confidentiality at Border Crossings

For the most part, border patrol searches of electronic devices will be difficult to predict. But there are some actions that attorneys and companies can take to help protect privileged or confidential information before and after a border search. Some protective steps might include:

- Storing data on the cloud, rather than on individual devices. Although cloud storage may raise a host of other cybersecurity issues, if the data is not stored on the device crossing the border, it should not be accessible to CBP agents. Just be sure to log off of your cloud storage account.
- If employees frequently cross international borders to conduct business, consider keeping duplicate devices on either side of the border, so that an employee need never carry a device across the border.
- If you must travel with a device, consider travelling with a clean "loaner" device that you do not use for your day-to-day activities.
- Before travelling, remove all unneeded privileged or confidential information from your device. For example, you may want to remove your work email account from your phone before crossing a border and restoring it afterwards. While deleted information may still be revealed in the event of a forensic search, it will at least not be immediately visible to a cursory review at the border.
- If your device is searched, notify CBP that it contains attorney-client privileged information or other confidential information. Notifying CBP that certain information is privileged imposes a requirement that CBP must suspect a crime before proceeding with the search. For both privileged and non-privileged confidential information, CBP must take steps to ensure the confidentiality of the information. But beware – if the CBP agent suspects that evidence of a crime is within information claimed to be privileged, you will have to wait for Associate/Assistant Chief Counsel to arrive before the search can continue.
- Finally, if your device has been searched (particularly if searched out of your sight), you should assume that your data has been copied and shared with other law enforcement agencies. You should immediately change all of your account passwords afterwards.

Although we are not all carrying government secrets relating to the future of the space program, like Sidd, attorneys, clients, and employees all potentially have a wealth of confidential or privileged information on the electronic devices with which they travel. Taking some simple protective steps now may prevent that information from being unnecessarily shared with a third party.

Endnotes

1 Loren Grush, *A US-born NASA scientist was detained at the border until he unlocked his phone*, The Verge, Feb. 12, 2017, available at: https://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban (last accessed June 1, 2017).

2 *US v Ramsey*, 431 US 606, 623; 97 S Ct 1972 (1977).

3 19 CFR 162.6.

4 *See Abidor v Napolitano*, 990 F Supp 2d 260 (ED NY, 2013) (pictures of terrorist groups); *US v Arnold*, 533 F Supp 1003 (CA 9, 2008) (child pornography); *US v Rodriguez*, No. 11-cv-344, 2011 WL 3924958 (SD Tex, Sept 6, 2011) (evidence of drug activities).

5 CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information*, at § 5.1.2 (rev. Aug. 2012).

6 *Id.* at 5.1.4.

7 *Id.*

8 *Id.* at 5.4.1.3.

9 *Id.* at 5.3.2.3.

10 *Id.* at 5.3.2.6.

11 See *id.* at 5.2.

12 *Id.* at 5.2.1.

13 *Id.* at 5.2.3.

14 *Id.* at 5.3.1.

15 *Id.* at 5.4.1.1.

16 *US v Irving*, No. S3 03 CR.0633, 2003 WL 22127913 (SD NY, Sept 14, 2003).

17 *Abidor*, *supra* note 4.

18 *Id.*

19 *Id.* at 276.

20 *US v Cotterman*, 709 F 3d 952, 965 (CA 9, 2013).

21 *Id.*

22 *Id.*

23 *Id.* at 967.

24 *Abidor*, *supra* note 4, at 267.

25 *US v Linarez-Delgado*, 259 Fed Appx 506 (CA 3, 2007); *US v Ickes*, 393 F 3d 501 (CA 4, 2005).

26 19 USC 507(a)(2).

27 *US v Kirschner*, 823 F Supp 2d 665, 669 (ED Mich, 2010).

Appellate Practice Report

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Judicial Review of Arbitration Awards Under Michigan's Uniform Arbitration Act

Although Michigan's Uniform Arbitration Act ("MUAA"), MCL 691.1681, *et seq.*, has been in effect since 2013, many practitioners still think of MCR 3.602 when it comes to seeking judicial review of arbitration awards. In addition, the continued existence of the court rule has resulted in some confusion because it contains different deadlines for seeking to vacate, modify, or correct an arbitration award. But once it is determined that the Act applies, the timing and process for challenging an award becomes relatively straightforward.

Applicability of the MUAA

Section 3 of the Act provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." At the same time, the Act "does not affect an action or proceeding commenced ... before this act takes effect." MCL 691.1713. This means that the Act governs if the claim for arbitration was filed on or after July 1, 2013. *Fette v Peters Const Co*, 310 Mich App 535, 541 (2015). The Act does not apply, however, "to an arbitration between members of a voluntary membership organization if arbitration is required and administered by the organization." MCL 691.1683(2).[1] Moreover, in domestic relations cases, if there is a conflict between the Act and the Domestic Relations Arbitration Act ("DRAA"), MCL 600.5070, *et seq.*, the DRAA controls. MCL 600.5070(1).

Timing to Seek Judicial Review of an Award

With one exception, the MUAA provides that if a party wants a court to vacate, modify, or correct an arbitration award, the party must file a motion within 90 days of receiving notice of the award, or of a modified or corrected award. See MCL 691.1703(2), 691.1704(1). The one exception is that a party seeking to vacate an award on the ground that it "was procured by corruption, fraud, or other undue means" must file a motion "within 90 days after the ground is known or by the exercise of reasonable care would have been known by the moving party." If there is not yet a pending civil action between the parties, "a complaint regarding the agreement to arbitrate must be filed and served as in other civil actions." MCL 691.1685(2).

So what about MCR 3.602? In contrast with the 90-day period for challenging an arbitration award contained in the MUAA, the court rule provides two different deadlines depending on whether there is already a pending civil action. If an action is pending, a motion to vacate, modify, or correct an award must be filed "within 91 days after the date of the award." MCR 3.602(J)(3), (K)(2).[2] But if there is **not** already a pending action, a complaint must be filed much sooner, i.e., "no later than 21 days after the date of the arbitration award." MCR 3.602(J)(1), (K)(1).

The key to deciding which deadline applies is to determine whether the MUAA governs the arbitration. If so, then the court rule does not apply, and the timing and procedure for challenging the award is governed by the MUAA. This is consistent with both the text of MCR 3.602 and the staff comment. MCR 3.602(A) provides:

> Courts shall have all powers described in MCL 691.1681 et seq., or reasonably related thereto, for arbitrations governed by that statute. **The remainder of this rule applies to all other forms of arbitration** .... (Emphasis added).

Thus, the court rule makes clear that the statutory procedures apply **except** in cases that are not governed by the statute (e.g., domestic relations arbitrations or arbitrations

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commenced before the Act took effect). The staff comment to MCR 3.602 confirms this, explaining that the rule applies "to all other forms of arbitration that are not described in the [MUAA]."

Section 3 of the Act provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made."

Grounds for Vacating, Modifying, or Correcting an Award

The grounds for vacating, modifying, or correcting an award are straightforward, but limited. Courts may vacate arbitration awards on grounds such as corruption, fraud, "evident partiality," or misconduct by the arbitrator. A court may also vacate an award if the arbitrator "exceeded the arbitrator's powers," if there was "no agreement to arbitrate," or if the arbitration was conducted without proper notice of its initiation. MCL 691.1703(1).

Probably the most common challenge to an arbitration award is that the arbitrator exceeded his or her powers. "[A]rbitrators can be fairly said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434 (1982).

In addition to asking the court to vacate an arbitration award, a party may request that the award be corrected or modified. A court may modify or correct an award if:

> (a) there is a "mathematical miscalculation" or "evident mistake in a description of a person, thing, or property referred to in the award";
>
> (b) the arbitrator made an award on a claim that wasn't submitted to the arbitrator, and the error can be corrected "without affecting the merits of the decision" on the claims that *were* submitted; or
>
> (c) the award is "imperfect in a matter of form not affecting the merits of the decision on the claims submitted."

MCL 691.1704. A party may join a motion to modify or correct an award with a request to vacate the award. MCL 691.1704(3).

Appeals

Once the court has decided a party's motion to vacate, correct, or modify an award, the MUAA also provides a right to appeal. A party may appeal an order "confirming or denying confirmation of an award," "modifying or correcting an award," or "vacating an award without directing a rehearing." An appeal may also be taken from "a final judgment entered under th[e] act." MCL 691.1708.[3]

Conclusion

There is still a relative dearth of case law addressing the MUAA's provisions, and the precise interplay between the statute and MCR 3.602 is not always crystal clear. The key is making the initial assessment of whether the arbitration is governed by the MUAA. If so, then its provisions control.

Panel Assignment in the Michigan Court of Appeals and Sixth Circuit

One of the questions appellate lawyers regularly field from clients concerns panel assignment: "Who's going to hear my case?"

Most often, the answer is, "We don't know yet." In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, parties don't learn which judges are assigned to a case until fairly close to oral argument. The Michigan Court of Appeals provides notice of oral argument and panel assignments about three to four weeks before an argument. The Sixth Circuit "seeks to give at least six weeks' advance notice of oral argument,"[4] but doesn't notify parties of panel assignments until two weeks before argument.

Still, it's possible to give clients a general sense of how courts assign judges to panels. For the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, the answer is that panel assignments are largely random—but not **completely** random.

Judge Assignment in the Michigan Court of Appeals

The Michigan Court of Appeals currently includes 26 judges. Each judge is elected from one of four geographical districts.[5] In 2012, the Michigan Legislature enacted legislation to gradually reduce the number of judges for each district from seven to six,[6] so the Court is on the road to having only 24 judges.[7]

The Court hears oral arguments at monthly sessions, and holds at least nine sessions per year.[8] For each session, a computer program assigns the Court's judges into panels of three. The Court's Internal Operating Procedures explain that this program "randomly rotates judicial assignments so that each judge sits with every other judge an approximately equal number of times over the years."[9] In other words, the random rotation isn't **truly** random; it tries to equalize pairings.

The Court handles motions somewhat differently. It considers substantive motions each Tuesday through "regularly scheduled motion docket panels at each of the court's locations."[10] The Court assigns a motion panel to each of Michigan's four districts on a monthly basis. Its Internal Operating Procedures don't explain how the Court assigns judges to motion panels but, presumably, the procedure looks something like the procedure for merits panels.

In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, panel assignments are **mostly** random. Both courts use algorithms that prevent Judge X and Judge Y from sitting on the same merits panels month after month.

The Court also maintains an administrative motion docket.[11] Typically, "the Chief Judge or another designated judge acting alone" will enter orders on administrative motions.[12] Michigan Court Rule 7.211(E) lists examples of administrative motions, such as motions to consolidate cases, to adjourn a hearing date, or to file an amicus curiae brief.

Judge Assignment in the Sixth Circuit Court of Appeals

The number of judges for each of the nation's twelve circuits is established by statute.[13] The Sixth Circuit Court of Appeals currently has 16 judges.

Congress doesn't have much to say about how circuit courts of appeals should assign judges to panels. The controlling statute simply states, "Circuit judges shall sit on the court and its panels in such order and at such times as the court directs."[14] But the Court's Internal Operating Procedures explain its procedures for panel assignment.

Internal Operating Procedure 34 states that the Court meets for two-week sessions. Each of the Court's judges sits for four consecutive days during a session.[15] The Court begins by assigning each active judge to one of the session's two weeks. Then "the balance of the court's active judges are assigned to the other sitting week."[16] After assigning judges to one of the session's two weeks, the Court uses a computer program to divide judges into panels. This program considers how long it's been since each judge sat on the same panel as the Court's other judges, and matches judges with "the longest intervals between sitting pairing."[17] This process ensures that each judge has "the opportunity to sit with as many different colleagues as possible"[18] So, like the Michigan Court of Appeals, the Sixth Circuit's procedure for assigning merits panels is largely random, but not completely random.

As for motions, the Sixth Circuit randomly assigns judges to motion panels on a quarterly basis.[19] These motion panels consider any motions filed before a case is assigned to a merits panel.[20] Although the Court's Internal Operating Procedures explain that panels are assembled randomly, they don't specify how motions are assigned among the Court's various panels. After a case is assigned to a merits panel (which means after assignment to the oral-argument calendar), the merits panel considers any motions in that case.[21]

Once the court has decided a party's motion to vacate, correct, or modify an award, the MUAA also provides a right to appeal.

Bottom line

In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, panel assignments are **mostly** random. Both courts use algorithms that prevent Judge X and Judge Y from sitting on the same merits panels month after month. The result is a bit of a paradox: to ensure that panel assignments appear random, both courts have adopted mechanisms to prevent truly random assignments.

Endnotes

1. Nevertheless, "a party to such an arbitration may request a court to enter an order confirming an arbitration award and the court may confirm the award or vacate the award for a reason contained in section 23(1)(a), (b), or (d)." *Id*.
2. That is, unless the motion "is predicated on corruption, fraud, or other undue means," in which case "it must be filed within 21 days after the grounds are known or should have been known." MCR 3.602(J)(3). In addition, "[a] motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award." *Id.*
3. In contrast, MCR 3.602(N) provides only that "[a]ppeals may be taken as from orders or judgments in other civil actions."
4. 6 Cir. IOP 34(b)(1).
5. MCL 600.302.
6. MCL 600.303a.
7. See IOP 7.201(D).
8. IOP 7.201(C).
9. IOP 7.201(D).
10. MCR 7.211(D); IOP 7.211(E).
11. MCR 7.211(E).
12. IOP 7.211(E)(2)
13. 28 USC 44.
14. 28 USC 46.
15. 6 Cir. IOP 34(a)(1).
16. 6 Cir. IOP 34(a)(1).
17. 6 Cir. IOP 34(a)(1).
18. 6 Cir. IOP 34(a)(1).
19. 6 Cir. IOP 27(a).
20. 6 Cir. IOP 27(a).
21. 6 Cir. IOP 27(a)(2).

Legal Malpractice Update

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CAUSATION & CASE-WITHIN-A-CASE ANALYSIS

Satgunam v Attorney Defendants, 2017 WL 1399982, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2017 (Docket Nos. 330454, 330660, and 331779).[1]

Facts: On July 15, 2010, the plaintiff performed bariatric surgery on "Patient A" at Sparrow Hospital. Patient A developed complications and died in October 2010. Patient A's estate submitted a notice of intent as to both Michigan State University ("MSU") and the plaintiff. Attorney Defendants agreed to represent the plaintiff and MSU.

Ultimately, MSU settled Patient A's medical-malpractice claim for $650,000. Pursuant to federal regulatory reporting requirements, MSU submitted a report of the settlement to the National Practitioner Data Bank. Reports are confidential; however, potential employers may access the reports.

According to the plaintiff, MSU settled the underlying claim without his authorization or consent. Additionally, the plaintiff claimed that Attorney Defendants did not counsel him as to the "ancillary consequences" of being reported to the data bank. As a result, the plaintiff alleged he is now "under-employable" or "completely unemployable."

The plaintiff filed a legal-malpractice lawsuit against Attorney Defendants. The circuit court summarily dismissed the legal-malpractice action, concluding that the plaintiff failed to establish that he would have been successful in defending the underlying medical-malpractice action but for the law firm's malpractice.

The plaintiff also filed a claim against MSU arguing that MSU breached its obligation to defend him in the underlying medical-malpractice action. The Court of Claims also summarily dismissed the plaintiff's claim, finding that MSU had the authority to settle the underlying action without the plaintiff's consent.

The plaintiff appealed, arguing that the "case-within-a-case doctrine" should not apply to his legal-malpractice suit. And, even if it did, the plaintiff argued that he met his burden by showing that the underlying medical-malpractice claim was defensible. The plaintiff also contested the circuit court's finding that he needed to present expert testimony on the issue of causation, reasoning that the harm to his reputation as a result of the report to the data bank could be determined from common knowledge.

As to the Court of Claims decision, the plaintiff argued that neither MSU nor the Attorney Defendants had authority to settle the underlying claim without Plaintiff's authorization.

The Court of Appeals affirmed the decisions of the circuit court and the Court of Claims.[2]

Ruling: *The Case-Within-a-Case Doctrine*

In *Basic Food Indus, Inc v Grant*, 107 Mich App 685 ; 310 NW2d 26 (1981), the Court of Appeals opined that the "vitality" of the case-within-a-case doctrine is limited in its applicability to cases such as where an attorney's negligence prevents the client from bringing a cause of action, where the attorney's failure to appear causes judgment to be entered against his client, or where the attorney's negligence prevents an appeal from being perfected.

The Court of Appeals distinguished the plaintiff's claims from *Basic Foods*, concluding that the plaintiff's alleged damages make the case-within-a-case analysis relevant. The plaintiff did not suffer any direct monetary damage (the settlement in

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the underlying medical-malpractice case was paid by either MSU or its insurer). Rather, the plaintiff alleged reputational damage that manifested in his inability to obtain another job. To establish damages, the Court of Appeals determined that the plaintiff must prove he would have prevailed in the medical-malpractice action and would have obtained another job if the report regarding the underlying settlement was not posted to the data bank.

The Court of Appeals held that the plaintiff had the burden of proving that he would have prevailed completely in the underlying action for there to have been no report to the data bank and that the jury could not make such a determination without expert opinion.

The Court of Appeals also concluded that the fact that the underlying case may have been defensible did not alleviate the plaintiff's burden of proving causation.

Common Knowledge & Causation

Generally, in professional-malpractice claims, an expert is required to establish the standard of conduct, breach of the standard, and causation. In limited circumstances—where the absence of professional care is so obvious—a malpractice action can survive without expert testimony. The plaintiff's experts testified as to the standard of care and conflicts of interest, but did not offer their opinions as to causation. The experts acknowledged that predicting the outcome of the case was impossible, highlighting the inherent unpredictability of trials. Interestingly, expert testimony seemed to suggest that there was a triable issue of fact in the underlying medical-malpractice case and possibly a breach of the standard of care by Attorney Defendants. However, that was not enough to create an issue of fact as to causation in the legal-malpractice context.

The Court of Appeals held that the plaintiff had the burden of proving that he would have prevailed completely in the underlying action for there to have been no report to the data bank and that the jury could not make such a determination without expert opinion.

The panel also pointed out a potentially more challenging causation issue for the plaintiff to overcome, which highlighted the need for expert testimony. The plaintiff claimed that his employment opportunities were affected due to the report to the data bank as a consequence of the settlement in the underlying medical-malpractice claim. However, there were actually **two** reports to the data bank. Because the plaintiff had to show that the report regarding Patient A's case (and not the other report) resulted in reputational harm, the need for expert testimony to establish causation was even more apparent.

Authority to Settle

The plaintiff argued that MSU lacked legal authority to settle the underlying medical-malpractice claim without his consent, based on their agreement to provide him with representation and indemnification. The Court of Appeals determined that the agreement did not provide the plaintiff the authority to control the case, nor did the agreement abridge MSU's statutory right to settle the claim pursuant to MCL 691.1408(1). Importantly, the Court of Appeals noted that the plaintiff was aware of the facilitative process and knew that settlement negotiations were ongoing.

Practice Note: On its face, this unpublished (and very fact specific) case buttresses the case-within-a-case doctrine. A literal reading may support the position that legal-malpractice claims against defense attorneys fail unless the former client shows they would have prevailed on a summary disposition or directed verdict motion.

JUDICIAL ESTOPPEL BARS MALPRACTICE ACTION PREMISED ON POSITION INCONSISTENT WITH PRIOR TESTIMONY

Roth v. Attorney Defendants, 2017 WL 1488869, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2017 (Docket No. 329018).

Facts: The plaintiff hired Attorney Defendants to represent her in divorce proceedings. On the record and under oath, the plaintiff acknowledged her understanding of the terms of the settlement agreement, that she would be bound by the settlement agreement, and that she had the right to go to trial. The plaintiff testified it was her choice to resolve the divorce proceedings pursuant to the terms of the settlement agreement, and the judge subsequently granted the judgment of divorce consistent with the settlement agreement.

The plaintiff filed a legal-malpractice lawsuit against Attorney Defendants arguing that Attorney Defendants were negligent in failing to determine the value of the marital estate before engaging in settlement negotiations. The trial court granted Attorney Defendants' motion for summary disposition on the basis that the plaintiff failed to establish that she would have obtained a better result had she proceeded to trial.

The plaintiff appealed.

Based on her prior testimony, the plaintiff was judicially estopped from asserting that she did not want to settle the case in the subsequent legal-malpractice action.

Ruling: The Court of Appeals affirmed the trial court's decision, but for a different reason. The panel premised its holding on the theory of judicial estoppel. Judicial estoppel prevents a party from maintaining a position inconsistent with one asserted under oath in an earlier judicial proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509 (1994). The doctrine is "widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play fast and loose with the legal system." *Id*. (internal citations and quotations omitted).

The Court of Appeals concluded that the "heart of Plaintiff's legal malpractice case is her assertion that she was tricked and/or coerced into agreeing to the settlement" at the hearing. In her deposition, the plaintiff claimed that she

did not know that the purpose of the hearing in the underlying case was to place a settlement on the record, and she did not want to settle her case. The Court of Appeals determined that this was contrary to her unequivocal testimony in the divorce proceeding.

Based on her prior testimony, the plaintiff was judicially estopped from asserting that she did not want to settle the case in the subsequent legal-malpractice action.

Practice Note: A client generally cannot sustain a legal-malpractice action based on a position that is inconsistent with prior testimony in a judicial proceeding. However, settling a case does not, as a matter of law, preclude a client from maintaining a legal-malpractice action against the attorney who represented the client in the underlying matter. In *Lowman v Karp*, 190 Mich App 448 (1991), the plaintiff signed a settlement agreement with the notation: "Even though I feel this case is worth more I am accepting on the sole advise [sic] of my attorney." In contrast to the instant case, the *Lowman* plaintiff claimed that after she informed attorney defendant that she did not want to settle, attorney defendant "flatly refused to try the case." *Id.*, at 454. Being so close to the trial date, the *Lowman* plaintiff was left with little recourse besides accepting the settlement offer. The Court of Appeals did not discuss *Lowman* in affirming summary disposition in the instant case.

Endnotes

1. David Anderson and Michael Sullivan thank Jim Hunter for his contributions to this report.
2. The Court of Appeals also upheld the trial court's determination as to the appropriateness and amount of case-evaluation sanctions.

MDTC Legislative Report

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With the Memorial Day holiday behind us, summer has now arrived and our Legislature is entering into the last two weeks of scheduled sessions before the summer recess. With no election looming in the fall, our legislators may have an opportunity to enjoy some more time off if they are able to complete their work on the fiscal year 2017-2018 budget before the recess, as planned. That process has been complicated somewhat this year by a shortfall in the projected General Fund balance and disagreements between the Governor and the Republican leadership about spending for infrastructure improvements and legislative proposals to eliminate unfunded liability in the teacher's retirement system by modification of the benefits available to new hires. But there is hope on all sides that these differences can be resolved so that Governor Snyder's new tradition of completing the budget in June can continue.

In addition to their work on the budget, our legislators have focused their attention upon a number of the majority party's priorities, and the pundits have been watching with great interest to see who is lining up to replace Governor Snyder in next year's election. Although several familiar and unfamiliar potential candidates have expressed interest, at present most expect that the race will ultimately come down to a contest between Attorney General Bill Schuette and former Senate Minority Leader Gretchen Whitmer. It is interesting to note that Lieutenant Governor Brian Calley, who has also tossed his hat into the ring, has recently proposed a constitutional amendment to make the Legislature part-time. I have not yet heard where the smart money is coming down on that proposal and have not pledged any of my own, but we shall see.

New Public Acts

As of this writing on June 1st, there are 42 Public Acts of 2017. Nearly half of these address issues concerning probation, parole and other matters of criminal procedure. The few that may be of any interest to our members as civil litigators include:

2017 PA 39 – Senate Bill 118 (Hansen – R), which will amend the Natural Resources and Environmental Protection Act (NREPA) to provide railroads with immunity from civil liability for injuries suffered by persons while present on a former railroad right-of-way which has been dedicated for use as a public trail during the time when the former right-of-way is in use for that purpose. This amendatory act will also extend the currently existing limited immunity from liability for injuries suffered by persons using a Michigan Trailway or other public trail or land improvement for recreational purposes without compensation to persons, other than a for-profit entity, that have contracted with the owner or tenant of the property for construction, maintenance or operation of a trail or other land improvement. With respect to those persons, there will be no liability for such injuries unless caused by gross negligence or "willful and wanton misconduct." Public Act 39 will take effect on August 21, 2017.

2017 PA 29 – House Bill 4063 (Barrett – R), which will amend the Penal Code to establish new criminal penalties for the idiots who deliberately shine lasers or similar devices producing a "beam of directed energy" at an aircraft or into the path of an aircraft or a moving train. Violation will be a felony, punishable by imprisonment for up to 5 years and/or a fine of up to $10,000. This act will take effect on August 8, 2017.

Old Business and New Initiatives of Interest

As I mentioned in my last report, **SJR F (Bieda – D)** and **HJR G (Vaupel – R)** each propose an amendment of 1963 Const, art 6, § 19, to eliminate subsection (3), which currently provides that: "No person shall be elected or appointed to a judicial office after reaching the age of 70 years." If either of these joint resolutions is approved

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by the requisite two-thirds vote in each house of the Legislature, the proposed amendment will be presented to the voters for approval at the next general election. **SJR F** was reported by the Senate Judiciary Committee without amendment on March 9, 2017, and now awaits consideration by the full Senate on the General Orders calendar. **HJR G** was reported by the House Judiciary Committee without amendment on April 25, 2017, and now awaits consideration of the full House on the Second Reading calendar. Further consideration of both resolutions appears to be on hold, as discussions of alternative options continue.

[S]pecifically extend Michigan's constitutional protections against unreasonable searches and seizures to electronic data and electronic communications.

HJR C (Runestad – R) proposes an amendment of 1963 Const, art 1 § 11, to specifically extend Michigan's constitutional protections against unreasonable searches and seizures to electronic data and electronic communications. This joint resolution was passed by the House on May 17, 2017, and has now been referred to the Senate Government Operations Committee.

Senate Bill 349 (Colbeck – R) proposes the creation of a new "campus free speech act" that would prohibit a "public institution of higher education" (a community college or state university) from restricting "expressive conduct" (including peaceful forms of assembly, protest, speech, distribution of literature, carrying signs and circulating petitions) in public areas of their campuses unless a restriction: 1) is necessary to achieve a compelling state interest; 2) is the least restrictive means for furthering that interest; 3) leaves open ample alternative opportunities to engage in the expressive conduct; and 4) allows for spontaneous assembly and distribution of literature. An action for enforcement could be brought by an individual aggrieved by a violation, or by the Attorney General, to obtain damages, injunctive relief and attorney fees. **Senate Bill 350 (Colbeck – R)** proposes amendments of the State School Aid Act of 1979 which would require community colleges and public universities receiving state appropriations to participate in the formation and direction of a Higher Education Committee on Free Expression in the Department of Education, and strongly encourage those institutions to develop and adopt a policy, with specified content, to protect the right of free expression on college campuses, and for discipline of those who would seek to prevent it.

These bills were introduced in response to recent incidents on college campuses in which persons wishing to publicly express unpopular political viewpoints have been prevented from doing so by official action or intimidation from individuals wishing to silence them. The Senate Judiciary Committee heard testimony on the bills on May 16, 2017, which included opposition expressed by representatives of the state universities based, in part, upon their claim that the proposed requirements would violate their constitutional autonomy. These criticisms prompted a deferral of further consideration, and the bills have not been rescheduled. The alleged infringement of constitutional autonomy has now been addressed by **HJR P (Runestad – R)**, which proposes amendments of Article VIII of the state constitution to provide specific constitutional authorization for the Legislature to provide, by law, for the protection of free speech, expression, and rights of assembly at public institutions of higher education.

[P]rovide railroads with immunity from civil liability for injuries suffered by persons while present on a former railroad right-of-way which has been dedicated for use as a public trail.

HJR Q (Barrett – R) proposes an amendment of Const 1963, art 4 § 13, to transform our Legislature from full to part-time. The amendments would provide that, unless called to convene on extraordinary occasions, the Legislature would meet only for one weekend each month, and for two sessions which would each consist of two consecutive weeks – the first session being conducted in January, February or March, and the second occurring in July, August or September. This joint resolution was introduced on May 31, 2017, and referred to the House Committee on Government Operations. This writer is not going to bet any money that this idea will ever be brought to a vote by the politicians across the street. But as previously discussed, Lieutenant Governor Calley has suggested a separate ballot proposal to accomplish this change, the details of which have not yet been disclosed. The success of that effort remains to be seen.

Senate Bill 333 (Jones – R) proposes amendments of the Revised Judicature Act, MCL 600.8031 to refine the statutory definition of "business or commercial disputes" included within the jurisdiction of the business courts. The amendments would clarify that the existing reference to "members" of a business enterprise is limited to members of a limited liability company or similar business organization, and that the list of parties included in a "business or commercial dispute" would also include guarantors of a commercial loan. The list of specifically excluded actions under subsection 8031(3) would be expanded to include supplementary hearings for enforcement of judgments, actions for foreclosure of construction and condominium liens, and actions for enforcement of condominium and homeowners association governing documents. The legislation also proposes an amendment of MCL 600.8035 to clarify that the business court has jurisdiction over business and commercial disputes in which equitable or declaratory relief is sought. This Bill was passed by the Senate on May 16, 2017. It was reported by the House Judiciary Committee on May 30, 2017, and now awaits consideration by the full House on the Second Reading calendar.

House Bills 4148 through 4157 (Republicans Chatfield, VanderWall, Allor, LaFave, Hauck, Iden and Bellino; and Democrats Moss, Lasinski and Guerra) This bipartisan package of bills proposes amendment of the

Freedom of Information Act (FOIA) to add a new Part 2, to be known as the "Legislative Open Records Act" ("LORA"). The new sections would add new provisions, modeled after existing sections of FOIA, requiring disclosure of records of legislators and legislative branch agencies and employees previously exempted from disclosure under FOIA, subject to specified exclusions and the privileges and immunities provided under Article IV, Section 11, of the State Constitution. The new sections would provide for a limited review of decisions of the "LORA Coordinator" denying requests for production of documents by appeal to the Administrator of the Legislative Council, but would not create a private cause of action for violations. These bills also propose amendments to existing sections of FOIA to eliminate the existing exemptions of the Governor, the Lieutenant Governor, their executive offices, and the employees thereof, from the Act's definition of "Public Body," thereby extending the coverage of the Act to their records, subject to specified exemptions. These bills, a reintroduction of a package passed by the House last September, were passed by the House on March 16, 2017, and have now been referred to the Senate Government Operations Committee.

House Bill 4461 (Cochran – D) proposes the creation of a new "death with dignity act." The new act would establish detailed procedures to permit a physician to prescribe medication which would allow a patient suffering from a terminal disease to end his or her life in a humane and dignified manner, and provide immunity from civil and criminal liability for actions taken in good faith in accordance with those provisions. The act would define "terminal disease" as "an incurable and irreversible disease or progressive pathological condition that has been medically confirmed and will, within reasonable medical judgment, produce death within 6 months." The required procedures are designed to ensure that a patient's request for life-ending medication would be based upon an informed and voluntary decision. The proposed act is very similar to the "assisted suicide" ballot proposal which was rejected by the voters several years ago after a campaign featuring a well-organized and intense opposition. HB 4461 was introduced on March 30, 2017, and referred to the House Committee on Health Policy, but has not been scheduled for hearing as of this writing.

In addition to their work on the budget, our legislators have focused their attention upon a number of the majority party's priorities.

To ensure greater freedom to be armed as one chooses, **House Bill 4416 (Hoitenga – R)** would amend the Penal Code, MCL 750.227, to eliminate the existing prohibition of carrying a pistol concealed on or about one's person, or in a vehicle, without a license for carrying a concealed weapon. Approval of this change would effectively eliminate the present requirement that a concealed pistol license be obtained in order to carry a pistol concealed or in a vehicle within Michigan, although the current prohibition would be maintained with respect to persons who are prohibited by state or federal law from possessing a firearm. And with the elimination of the licensing requirement, the firearm training required for issuance of a concealed pistol license would no longer be required as a prerequisite for concealed carrying. This bill was reported by the House Judiciary Committee with a Substitute H-1 on May 30, 2017, and now awaits consideration by the full House on the Second Reading calendar.

And for those who prefer knives, **Senate Bill 245 (Jones – R)** proposes the repeal of MCL 750.226a, which currently provides a criminal penalty of imprisonment for up to a year and/or a fine of up to $300 for possession of a switchblade. This bill was passed by the Senate on April 20, 2017. It was reported by the House Judiciary Committee without amendment on May 23, 2017, and now awaits consideration by the full House on the Second Reading calendar.

[P]roposes an amendment of Const 1963, art 4 § 13, to transform our Legislature from full to part-time.

What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the board through any officer, board member, regional chairperson or committee chair.

Medical Malpractice Report

By: Kevin M. Lesperance and Andrea S. Nester, *Henn Lesperance PLC*

The Collateral-Source Rule and Medical Malpractice: Post-*Greer* Legislation Limiting Recoverable Damages

Even if you are fortunate enough to have avoided the experience of an adverse jury verdict, most defense practitioners are well aware of Michigan's statutory collateral-source rule. Generally, the term "collateral source" refers to compensation for injuries from a source independent of the tortfeasor.[1] Insurance proceeds are a very common "collateral source." The statutory collateral-source rule entitles the defense to a post-verdict reduction from the judgment of collateral-source proceeds if certain conditions are met.[2]

Historically, however, parties operated under a somewhat different system. As was stated in the Supreme Court's concurring opinion in *Greer v Advantage Health*, the common-law collateral-source rule "was first recognized in 1854, at about the same time the theory of liability based on fault was established."[3] Pursuant to the rule's common-law form, "an injured party was allowed to retain the proceeds of insurance paid to him or her as a policyholder **and** recover a second time from a tortfeasor."[4] In other words, Michigan's common-law rule "provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources."[5] The original intent of the common-law rule included punitive and deterrent objectives.[6]

However, in 1986, as part of a more global move to enact comprehensive tort reform in Michigan, "the Legislature abrogated the common-law collateral source rule for tort claims when it enacted MCL 600.6303 . . . ."[7] In contrast to the common-law, the statutory version permits the "reduction of a plaintiff's award for past economic damages by payments from collateral sources after a verdict has been rendered."[8]

Statutory Collateral Source Rule

As indicated above, the collateral-source rule codified at MCL 600.6303 allows the defense to introduce evidence **after** a verdict for the plaintiff (but before judgment is entered on the verdict) to establish that the expense of medical care, rehabilitation, loss of earnings, loss of earnings capacity, or other economic loss was paid by a "collateral source." Thereafter, if the court finds that the plaintiff's loss has been paid or is payable by a collateral source, the plaintiff's judgment must be reduced accordingly.[9] This reduction makes sense based on the generally accepted purpose behind the statutory enactment: "to prevent personal injury plaintiffs from being compensated twice for the same injury."[10]

Relevant to the remaining discussion, the statutory definition of "collateral source," includes, in pertinent part, "benefits received or receivable from an insurance policy."[11] As is provided by the statute, within 10 days after a verdict in favor of the plaintiff, plaintiff's counsel must provide notice to any entity entitled to a lien on the amount awarded, including any healthcare insurer or insurers that have paid, or are otherwise contractually obligated to pay, the plaintiff's medical expenses. A lienholder then has 20 days after receipt of the notice to exercise their right of subrogation.[12] However,

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the statute excludes from the definition of "collateral source" any benefits paid or payable by a legal entity entitled by contract to a lien against plaintiff's recovery if the contractual lien has been exercised.[13]

In other words, the statutory exception to the collateral-source rule permits the plaintiff to recover the amount of his or her expenses paid by a contractually entitled lienholder. However, as anyone who has reviewed their latest health insurance statement is aware, a health insurer almost never pays the actual amount billed by the hospital or health facility. Pursuant to negotiated contractual agreements between health insurers and healthcare providers, the billed amount is reduced or "discounted." The health insurer only actually pays the discounted amount, and is only able to exercise a lien for the amount it actually paid. Simply put, a plaintiff's actual medical expenses are not congruent with the amounts originally billed.

Nevertheless, because evidence of payments made by an insurer is generally inadmissible during the trial phase, plaintiffs are often awarded past medical expenses based on the full amount billed by the healthcare provider.[14] This creates a scenario where the insurer pays the discounted amount, but the plaintiff thereafter receives an economic damages award for the full amount of the original bill. From the perspective of many defense attorneys, this essentially created a windfall scenario for plaintiffs who received the full amount billed as prior economic damages, but never paid an amount greater than the discounted rate negotiated for by the insurer.

Consider the following example: a plaintiff is billed $100.00 for a medical procedure that becomes the subject of a medical malpractice suit. The jury returns a verdict in favor of the plaintiff, and awards $100.00 in past medical expenses to cover the amount billed for the procedure. Pursuant to a contract negotiated on behalf of its insureds, the health insurer actually paid only $75.00 for the procedure. The health insurer exercises a lien and is reimbursed by the plaintiff for the $75.00 it originally paid to the healthcare provider on plaintiff's behalf. This leaves the plaintiff with a windfall of $25.00. Essentially, the plaintiff is permitted to receive "economic" damages that do not reflect the amount ever actually paid for any prior medical expenses (or expenses of any kind). This dichotomy—between what was actually occurring pursuant to the statue and the statute's stated purpose—became the subject of *Greer*.

The statutory collateral-source rule entitles the defense to a post-verdict reduction from the judgment of collateral-source proceeds if certain conditions are met.

Greer v Advantage Health.

In *Greer*, the issue was whether the above-described discount that insurers receive on a healthcare provider's bill is an exception to the collateral source rule pursuant to MCL 600.6303.[15] Defendants asserted that the discounts were, in fact, a collateral source because they were a benefit "received or receivable" from an insurance policy.[16] As such, Plaintiff's verdict award should have been reduced by the amount of the discount, i.e., the benefit received by Plaintiff.

However, in a published opinion issued May 13, 2014, the Court of Appeals disagreed.[17] Specifically, based on its interpretation and application of MCL 600.6303, the Court held that—in addition to actual insurance payments for which a lien can be asserted—insurance discounts fell under the statutory exclusion. In other words, they could not be reduced from plaintiff's judgment post-verdict. To the credit of the defense, the Court agreed that the insurance "discounts," which reduced the total amount of medical expenses the plaintiffs would otherwise have to pay, were plainly "benefits received or receivable from an insurance policy" and were, therefore, a collateral source as defined by the first portion of MCL 600.6303(4).[18] The Court also agreed that this reading of MCL 600.6303 was consistent with (1) "common sense and economic reality," and (2) the dictionary definitions of "benefit" as being "something that is advantageous or good; an advantage" or "a payment made to help someone or given by a benefit society, insurance company, or public agency."[19] However, the Court ultimately concluded that the discounted amounts were also subject to the exclusion pursuant to the latter portion of MCL 600.6303(4). Based on the plain language of the rule, the Court found that application of the exclusion was not limited to the amount of a potential contractual lien, rather it applied to all benefits that were paid or payable by a legal entity contractually entitled to a lien, i.e., the discounted amounts were likewise covered by the exclusion.[20]

Defendants filed a timely application for leave to appeal on June 17, 2014, and the Michigan Supreme Court granted leave to appeal on December 10, 2014. However, after oral arguments were scheduled and heard on the application, the Michigan Supreme Court vacated its previous order granting leave and ultimately declined to hear the case in an Order dated July 8, 2016, leaving in place the decision of the Michigan Court of Appeals.[21]

In a concurrence to the July 2016 Order, Justice Zahra (joined by Justices Young and Markman) stated that "[t]he Court of Appeals' opinion will ultimately authorize some amount of recovery for medical expenses never incurred by injured plaintiffs" and that, considering the above-discussed legislative intent, it seemed "counterintuitive that the Legislature would enact the statute with a loophole that permits a plaintiff to recover for medical expenses never owed or paid."[22] In conclusion, Justice Zahra opined that "[t]o the extent that the Legislature did not intend to allow a windfall recovery of the retail price for medical services that were provided at a discount, the statute needs to be amended."[23]

Subsequent Legislative Action

Based on the Court's concurrence and commentary from the defense bar, the Michigan Senate introduced SB 1104 on September 21, 2016.[24] The associated Legislative Analysis of what has now become Public Act 556 of 2016, codified at MCL 600.1482, provides pointed insight into the discussion and thought process of the Legislature as it enacted the post-*Greer* "fix." For example, as noted in the Senate Fiscal Analysis, the policy

concerns presented to the Legislature in support of the bill included those articulated in *Greer*, notably the following:

> Michigan courts have made it clear that the purpose of the statutory collateral source rule is to prevent plaintiffs from receiving a double recovery for a single loss. This purpose is defeated when a plaintiff receives both the amount actually paid by his or her insurer (which the insurer has a lien on) and the amount of a discount that the insurer did not pay (which the plaintiff keeps).[25]

Among the arguments presented in opposition to the bill, the following points were asserted:

- By enacting a "fix" to the decision in *Greer*, the Legislature is effectively denying plaintiffs paid-for benefits because insurance "discounts" are negotiated on behalf of prudent purchasers of health insurance, and any efforts expended into those negotiations are paid for by an injured plaintiff's health insurance premiums;
- By preventing plaintiffs from recovering the amount of a negotiated discount, SB 1104 could make it unaffordable to bring medical malpractice actions; and
- The actual billed costs (as opposed to the discounted rates paid by insurers) best reflect the "reasonable value" of medical services.[26]

However, in rebuttal to these plaintiff-friendly arguments, the following points are noteworthy:

- The purpose of the statutory collateral-source rule (preventing a double recovery for a single loss) is severely undermined when a plaintiff receives both the amount actually paid by the insurer and the amount of the discount (which no one will ever pay);
- As indicated by the above-mentioned purpose of the statutory collateral-source rule, it is not meant to address any issues regarding the affordability of bringing a medical-malpractice suit, and even assuming arguendo that this is a legitimate concern, improving affordability by providing plaintiffs a double recovery under the guise of "economic" damages is incredulous at best; and
- It is rare for a patient to pay the actual billed amount, and there are often significant modifications between the amount billed and the amount a healthcare provider might eventually accept as payment, which creates a legitimate question with regard to whether the amount billed actually represents the "reasonable value" of medical services.[27]

As evidenced by its action, the Legislature ultimately concluded that it was necessary to amend the law and close what appeared to be the inadvertent loophole exposed in *Greer*.[28] Accordingly, pursuant to the recently enacted MCL 600.1482, damages for medical expenses (including rehabilitation costs) in medical malpractice actions filed on or after April 10, 2017 are limited to the actual damages for medical care.

Specifically, the statute provides that, "notwithstanding any other law to the contrary . . . both of the following apply" in any medical malpractice action:

- Recoverable damages for past medical expenses or rehabilitation service expenses shall not exceed the actual damages for medical care that arise out of the alleged malpractice; and
- Courts shall not permit plaintiffs to introduce evidence of past medical expenses or rehabilitation service expenses at trial, "except as evidence of the actual damages for medical care."[29]

Pursuant to the statute, the phrase "actual damages for medical care" is defined as follows:

> (i) The dollar amount actually paid for past medical expenses or rehabilitation service expenses by or on behalf of the individual whose medical care is at issue, including payments made by insurers, but excluding any contractual discounts, price reductions, or write-offs by any person; [and]
>
> (ii) Any remaining dollar amount that the plaintiff is liable to pay for the medical care.[30]

At least in the realm of medical malpractice, "Defendants and their insurers will no longer be required to pay plaintiffs for costs they never incurred."[31] As these payments are ultimately passed on to patients and policyholders in the form of lower costs, reduced premiums, and improved patient care, this enactment of MCL 600.1482 not only repairs an inadvertent loophole in the statutory collateral-source rule, it also protects the best interest of healthcare and health insurance consumers.[32]

Remaining post-*Greer* issues

While MCL 600.1482 is music to the ears of medical-malpractice defense practitioners, it is worth noting the readily apparent narrow scope of the statute: MCL 600.1482 applies only to medical malpractice actions. In contrast, the statutory collateral-source rule is applicable to all "personal injury" actions. Likewise, the Court's decision in *Greer* was not expressly limited to medical-malpractice cases. As such, defense practitioners should be aware of the arguments for and against limiting the collateral-source rule with regard to "discount" payments as litigation regarding this issue could arise in other contexts.

Furthermore, although at first blush it may arguably appear to be one of the more straightforward statutes (especially when compared to original collateral-source statute and complex common law), courtroom battles regarding interpretation are nevertheless bound to arise. By way of example, the statute does not provide a definition of "rehabilitation services." It is easy to imagine courts across the state coming to their own unique conclusions regarding the scope of this phrase.

The statutory enactment could also increase the frequency of dual-theory filings, specifically, plaintiffs bringing medically related claims under theories of both medical malpractice and ordinary negligence. These battles are nothing new in the field of medical malpractice and have arguably seen a resurgence of late.[33] Because of the limited scope of MCL 600.1482, if a case can be framed in terms of "ordinary negligence," plaintiffs could potentially rely on *Greer* to assert that they are entitled to the amount billed for medical expenses, i.e., the potential damage award could be greater.

Finally, medical-malpractice defense counsel should take note of the location of the statute: it was not codified anywhere near the statutory collateral source rule, nor does the phrase "collateral source" appear anywhere in the statutory

language. [34] Although these observations do not affect the legal import of the enactment, the location and verbiage—in conjunction with the fact that there will not likely be many referencing sources on Westlaw or Lexis for some time—could make the new section difficult to locate in a pinch.

Endnotes

1. Black's Law Dictionary (9th ed).
2. MCL 600.6303.
3. *Greer v Advantage Health*, 499 Mich 975 (2016)
4. *Id.* (emphasis added).
5. *Id.*, quoting *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58 (1990).
6. *Id*.
7. *Id*. MCL 600.6303 became effective on October 1, 1986. The statute has not been amended since its enactment.
8. *Greer v Advantage Health*, 499 Mich 975 (2016).
9. MCL 600.6303(1).
10. *Greer v Advantage Health*, 499 Mich 975 (2016), quoting *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 301 (1996).
11. MCL 600.6303(4).
12. MCL 600.6303(3).
13. MCL 600.6303(4).
14. "The collateral source rule bars evidence of other insurance coverage when introduced for the purpose of mitigating damages." *Nasser*, 435 Mich at 58. However, this is not an "absolute bar to the admission of such evidence." *Id.* For example, most jurisdictions "recognize an exception to the general rule of exclusion where the evidence is sought to prove malingering or motivation on the plaintiff's part not to resume employment or to extend the disability. In such cases, the decision to allow the evidence is within the sound discretion of the trial court." *Id.*
15. *Greer v Advantage Health*, 305 Mich App 192, 206 (2014).
16. *Id*. at 206-207.
17. *Id*. at 212-213.
18. *Id*. at 210.
19. *Id*. at 210-211, quoting Random House Webster's College Dictionary (1996).
20. *Id*. at 212–213.
21. *Greer v Advantage Health*, 499 Mich 975 (2016).
22. *Id.*
23. *Id.*
24. See, e.g., Senate Fiscal Agency, Med Mal: "Actual Damages" Recovery, S.B. 1104: Analysis as Enacted (March 1, 2017); House Fiscal Agency, Medical Malpractice Damages, Senate Bill 1104 as passed by the Senate (November 30, 2016).
25. SFA, "Actual Damages" Recovery, Analysis as Enacted, at 3.
26. *Id*. at 4-5. See also Senate Journal (October 20, 2016), p 1706.
27. See, e.g., SFA, "Actual Damages" Recovery, Analysis as Enacted, at 3-4.
28. *Id.*
29. MCL 600.1482(1).
30. MCL 600.1482(2)(a).
31. SFA, "Actual Damages" Recovery, Analysis as Enacted, at 4.
32. *Id.*
33. Several recent appellate cases wherein the appellate courts have been called upon to decide the issue of whether a claim sounds in ordinary negligence or medical malpractice suggest that there could be an increased volume of these filings. See, e.g., *Trowell v Providence Hosp & Med Centers, Inc*, 316 Mich App 680 (2016), lv granted 892 NW2d 370 (2017); *Estate of Turner v Mohler*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2016 (Docket No. 327110), lv pending; *Joe v Cmty Emergency Med Serv*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2016 (Docket No. 323276).
34. A proposed amendment that would have added significant language to the statute (most of which was not—arguably—defense friendly), including reference to the collateral-source rule, was not passed. See Senate Journal (October 20, 2016), p 1706-1707.

No-Fault Report

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Supreme Court Releases Opinion in *Covenant Medical Center v State Farm:* The End of Medical-Provider Suits?

On Thursday, May, 25, 2017, the Michigan Supreme Court released its long-awaited decision in *Covenant Medical Center v State Farm*, Docket Number 152758. In a 5-1 decision authored by Justice Brian Zahra (with Justice Richard Bernstein dissenting and newly-appointed Justice Kurtis Wilder not participating), the Michigan Supreme Court ruled that medical providers do not have an independent, statutory right to file suit against a no-fault insurance carrier to recover payment of medical expenses incurred by their patients. **However, as discussed more fully below, the Michigan Supreme Court left open the possibility that medical providers could still file suit against no-fault insurers under other alternative theories**. These include an allegation that the provider is a third-party beneficiary under the insurance contract between the insurer and the insured, or where the insured executes an assignment of benefits to the medical providers. However, a medical provider may face significant obstacles under either of these theories. As matters now stand, however, we can expect to see a dramatic decrease in the number of provider suits that are filed in this state. On the other hand, though, attorneys representing the injured claimants will probably be demanding higher settlements when resolving PIP claims in order to satisfy the demands of medical providers (who are essentially reduced to the status of lien holders) because, as noted by the Michigan Supreme Court in the majority opinion, "a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges"—they simply cannot sue the no-fault insurer, subject to the exceptions discussed more fully below.

Underlying Facts And Lower Court Rulings

The underlying facts are relatively straight forward. State Farm's insured, Jack Stockford, was involved in a motor-vehicle accident on June 20, 2011. He received medical treatment at Covenant Medical Center in Saginaw on July 3, 2012, August 2, 2012, and October 9, 2012, and incurred medical expenses totaling just under $44,000.00. State Farm denied coverage and refused to pay the medical expenses at issue. Stockford subsequently filed suit against State Farm in the Saginaw County Circuit Court and ultimately settled with State Farm for $59,000.00. As part of the settlement, Stockford executed a release which included all no-fault claims, including the medical expenses at issue, incurred through January 10, 2013.

Covenant Medical Center, which is based in Saginaw, filed suit in the Kent County Circuit Court (Grand Rapids) to recover payment of the medical expenses at issue, which probably explains why it had no knowledge of the Saginaw County Circuit Court litigation between Stockford and State Farm. The matter was later transferred to the Saginaw County Circuit Court. State Farm raised the release executed by Stockford as a defense to the claim—an argument that was accepted by the Saginaw County Circuit Court when it granted State Farm's motion for summary disposition.

Covenant Medical Center appealed to the Michigan Court of Appeals. In a published decision, the Court of Appeals reversed the decision of the Saginaw County Circuit Court and essentially ruled that State Farm would need to pay twice for the same medical expenses incurred by Stockford. In support of its holding, the Court of Appeals relied on the second sentence of MCL 500.3112, which provides:

> Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges

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> the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.

According to the Michigan Court of Appeals, the fact that Covenant Medical Center had submitted its medical expenses directly to State Farm constituted "the claim of some other person," which State Farm was not free to ignore. Therefore, the Court of Appeals ruled that this provision "requires that the insurer apply to the Circuit Court for an appropriate Order directing how the no-fault benefits should be allocated." This ruling, of course, gave rise to the numerous "Covenant Motions" that have been clogging the circuit courts' motion dockets since the decision was released.

Analysis

In its opinion, the Supreme Court began its analysis by noting that there is nothing in the statutory text of the No-Fault Insurance Act which provides for an independent cause of action by a healthcare provider against a no-fault insurer. The Court went to some lengths to analyze various sections of the Act, including MCL 500.3105(1) (dealing with the circumstances which give rise to a claim for no-fault benefits, otherwise referred to as the "gateway provision"), MCL 500.3107(1)(a) (defining what are "allowable expenses"), MCL 500.3157 (dealing with a healthcare provider's obligation to charge "a reasonable amount for products, services and accommodations rendered", with a proviso that "the charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance"), and MCL 500.3158(2) (regarding a medical provider's obligation to submit medical records and billing records to a no-fault insurer). In the the Supreme Court's opinion, none of these statutory sections supported a healthcare provider's independent right to file suit against a no-fault insurer.

As a result, the Michigan Supreme Court **overruled** decades of decisions from the Court of Appeals that had granted medical providers an independent cause of action against no-fault insurers, including *Wyoming Chiropractic Health Clinic v Auto-Owners Ins Co*, 308 Mich App 389 (2014), *Michigan Head & Spine, PC v State Farm Mut'l Auto Ins Co*, 299 Mich App 442 (2013); *Regents of the Univ of Michigan v State Farm Mut'l Ins Co*, 250 Mich App 719 (2002) and *Lakeland Neurocare Ctrs v State Farm Mut'l Auto Ins Co*, 250 Mich App 35 (2002). In its opinion, the Supreme Court noted that in the earlier cases, the Court of Appeals simply did not engage in a rigorous analysis of the statutory text, because the insurer did not actually contest the issue. Under MCR 7.215(J)(1), subsequent panels of the Court of Appeals were bound to follow these erroneous decisions. The Supreme Court, of course, was not so bound.

The Court Rejects Reliance On MCL 500.3112 As A Basis For Medical-Provider Suits

Not surprisingly, the Court devoted most of its analysis to the proper interpretation of MCL 500.3112. Due to the importance of this analysis, the entire text of MCL 500.3112 is excerpted below:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:
>
> (a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.
>
> (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

The Court noted that "the foundation of any opinion interpreting a statutory provision is the parsing of the words of the pertinent act or statute under review." *Covenant Medical Center*, slip op at 7. Accordingly, the Court carefully dissected all five sentences in MCL 500.3112 and concluded that reading the statute as a whole, there was nothing in that statute which provided a healthcare provider with an independent cause of action against a no-fault insurer. In discussing each sentence, the Supreme Court issued some significant rulings that will undoubtedly impact an insurer's handling of medical-provider claims.

With regard to the first sentence, the Supreme Court noted that it simply sets forth who may receive payment of no-fault benefits, **at the option of the insurer**. Utilizing the dictionary definition of the term "payable," defined as benefits that "may, can, or must be paid," the Supreme Court ruled that "PIP benefits, which are paid by the insurer, 'may, can, or must be paid' either (1) to the injured person or (2) for the benefit of the injured person." *Id*. at 16.

Obviously, "for the benefit of the injured person" means that an insurer is free to issue payment directly to the medical provider, which will discharge its obligation to pay benefits under the statute. The Supreme Court noted that simply because the insurer has a choice as to how a medical expense will be paid does not mean that a third-party, such as a healthcare provider, "has a statutory **entitlement** to that method of payment." To put it in another way, it appears that the no-fault insurer has complete discretion as to how medical expenses can be paid. It is apparently free to ignore a plaintiff's attorney's claim of a charging lien on payment of an undisputed medical expense, or it could issue payment to the injured claimant and his or her attorney.

With regard to the second sentence of MCL 500.3112, regarding discharge of an insurer's liability "unless the insurer has been notified in writing of the claim of some other person," the Court rejected the healthcare provider's argument that it qualifies as "some other person" for purposes of this section. Although not necessary for its decision, the Supreme Court strongly implied that this sentence "is likely applicable primarily to dependents and survivors given that the end of the statute pertains to the allocation of benefits to those groups of persons." *Id*. at 18 n 32.

With regard to the third sentence, the Supreme Court clearly rejected the "apportionment theory" that was at issue in the numerous "Covenant motions" that have taken place since the Court of Appeals issued its decision. In this regard, the Court rejected the notion that medical expenses can be "apportioned" between the injured Claimant and a medical provider. Instead, the medical provider is a creditor, and the insured person is the debtor:

> [T]he Michigan Supreme Court ruled that medical providers do not have an independent, statutory right to file suit against a no-fault insurance carrier to recover payment of medical expenses incurred by their patients.

This sentence merely provides a procedure for resolving doubts about which persons are entitled to benefits; it does not itself confer a right or entitlement on any person, including a healthcare provider, to sue a no-fault insurer. And the sentence's reference to "apportionment" cannot logically pertain to allowable expenses like the reasonable charges incurred for healthcare services, because an injured person owes the provider, and is entitled to PIP benefits for, the entirety of those allowable expenses under MCL 500.3107(1)(a), not an apportioned amount. [*Id*. at 18-19.]

In an important footnote, the Supreme Court again noted that the third sentence of MCL 500.3112 would "primarily pertain to dependent and survivor benefits" and then proceeded to describe situations where there could be competing claims of "dependency" under a survivor's loss claim pursuant to MCL 500.3110. *Id*. at 19 n 34.

The Supreme Court likewise rejected any reliance on the 4th and 5th sentences of MCL 500.3112 and noted that those two sentences, like the preceding two sentences, were intended to deal with survivor's loss claims—not claims for the healthcare provider's medical expenses.

To sum up, then, the Supreme Court rejected the idea that simply because the insurer has a choice as to how it will satisfy its obligations to pay no-fault benefits, "it does not establish a concomitant claim enforceable by an insured's benefactors." *Id.* at 20. The Supreme Court went on to explain:

> By permitting insurers to directly pay healthcare providers on an injured person's behalf, MCL 500.3112 allows the insurer to eliminate the insured as a conduit in the payment process, relieving the insured from having to redirect to the healthcare provider payment received from the insurer. It is not surplusage for the statute to expressly permit an insurer to directly pay the insured's healthcare bills in order to discharge its obligation to its insured. The fact that the statute grants that permission does not create a right in the providers to sue the insurer for payment. [*Id*. at 20-21, fn 36 (emphasis added).]

Simply put, although a healthcare provider has no **statutory right** to file suit against a no-fault insurer, it does not mean that all medical-provider suits must be dismissed. Rather, the Supreme Court held open the possibility that alternative causes of action may exist which would allow a healthcare provider to nonetheless maintain a cause of action against a no-fault insurer, based on one or more of the following circumstances.

Alternative Theory Number I –"Balance Bills"

Since the early 1990s, no-fault insurers have been utilizing third-party, medical-expense auditing companies such as ReviewWorks, Corvel, Mitchell, Rising Medical Solutions and the like to review and audit medical expenses for "reasonableness." These audits result in the insurer paying less than the amount charged by the provider. In many cases, the provider simply writes off the balance. However, the healthcare provider is not obligated to do so. It is permitted to file suit against the insured, or to initiate collection actions against the insured for payment of any remaining balance, and if it does, the no-fault insurer is obligated to fully defend and indemnify the insured in a claim for a "balance bill" payment under Insurance Commissioner Bulletin 92-3.

In the seminal case of *LaMothe v ACIA,* 214 Mich App 577; 543 NW2d 42 (1995), the insured sued AAA over the fear that it would be responsible for payment of those "balance bills" that were incurred because AAA refused to pay the full amount of medical expenses charged by the provider. In compliance with Insurance Commission Bulletin 92-3, the insurer agreed to "defend and indemnify the insured from liability," and even went so far as to issue a letter to the insured's attorney, which was excerpted by the Supreme Court in *Covenant* in footnote 18:

> The Court of Appeals quoted a letter that the insured sent the insured's attorney, which stated in part that "if any of the medical providers bring a claim against [the insured], [the insurer] will defend and indemnify him. In fact, [the insurer] will waive any technical defects and allow the provider to sue the [insurer] directly so that [the insured] won't even have to be a party to the litigation. [*Id*. at 8 n 18.]

Because the no-fault insurer had agreed to "fully defend and indemnify the insured from liability" in cases involving balance bills, and had indicated that it would waive "any technical defects" to allow a direct action against the insurer, the insured's lawsuit had to be dismissed.

In the author's opinion, the insurance company has two ways to handle any "balance bill" lawsuits. First, it can allow its insured to be sued by the healthcare provider, but consistent with its obligations

under Insurance Commissioner Bulletin 92-3, it must "fully defend and indemnify the insured" in that lawsuit. In this regard, the insurer needs to consider the ramifications of having its insured be sued by a healthcare provider who is not satisfied with the reductions being taken on its bills. The prospect of having the insured or the claimant being sued by a provider over an insurer's decision to pay less than the amount charged seems to be, in the opinion of the author, rather troublesome.

Therefore, in the author's opinion, the better way to approach these "balance bill" claims is to advise the provider that the insurer will "waive any technical defects" (namely, the holding in *Covenant*) and permit the healthcare provider to sue the insurer directly over the "balance bill." Either way, the insurer is still going to be obligated to defend any reductions taken pursuant to these third-party, medical-expense audits. The only difference is that the insurer gets to choose the method of defense. Either it defends itself in a direct action by the healthcare provider that it has consented to, or it defends the insured in a lawsuit over a "balance bill."

Simply put, although a healthcare provider has no **statutory right** to file suit against a no-fault insurer, it does not mean that all medical-provider suits must be dismissed. Rather, the Supreme Court held open the possibility that alternative causes of action may exist which would allow a healthcare provider to nonetheless maintain a cause of action against a no-fault insurer, based on one or more of the following circumstances.

Alternative Theory Number II – Third-Party Beneficiary Theories

A typical medical-provider suit contains the allegation that the insurer was in violation of the Michigan No-Fault Insurance Act when it refused to pay the medical provider's medical expenses. This cause of action, of course, is no longer permissible under the Supreme Court's decision in *Covenant*, unless the insurer consents, as in the case of "balance bills."

However, many healthcare provider complaints assert that the provider is a so-called "third-party beneficiary" under the insurance contract between the insured and the insurer. In an important footnote, the Supreme Court made it clear that it was not addressing any potential liability under a "third-party beneficiary" theory, although it did emphasize that such causes of action are necessarily dependent on the actual insurance policy language:

> We conclude today only that a healthcare provider possesses no statutory right to sue a no-fault insurer. While defendant argues that a provider likewise possesses no contractual right to sue a no-fault insurer given that healthcare providers are incidental rather than intended beneficiaries of a contract between the insured and the insurer, this Court declines to make such a blanket assertion. **That determination rests on the specific terms of the contract between the relevant parties.**
>
> See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003) ("A person is a third-party beneficiary of a contract only when *that contract* establishes that a promisor has undertaken a promise 'directly' to or for that person." (Citations omitted; emphasis added). This court need not consider whether Plaintiff possesses a contractual right to sue Defendant in this instant case because Plaintiff did not allege any contractual basis for relief in its Complaint. [*Id.* at 24, fn 39.] (emphasis added).

In other words, we need to examine the individual insurance contracts at issue to determine whether or not a medical provider is an "intended beneficiary," not an "incidental beneficiary" of the contract between the insured and the insurer.

The *Schmalfeldt* decision gives us some guidance. In *Schmalfeldt*, the plaintiff was playing pool at a bar when he was struck by another bar patron. As a result of his dental injuries, he asked the owner of the bar to pay his dental expenses, totaling just under $2,000.00. The bar owner refused. Schmalfeldt then filed suit against North Pointe Insurance Company, which had issued a commercial-liability-insurance policy to the owner of the bar. This policy contained a medical payments provision, where North Pointe agreed to pay up to $5,000.00 for medical expenses incurred as a result of a bodily injury caused by an accident so long as the injury occurred on or next to the insured's premises or because of the insured's operations. North Pointe refused to pay the medical expenses without a request from the bar owner. When the bar owner refused, Schmalfeldt filed a direct lawsuit against North Pointe.

The Supreme Court initially examined Michigan's Third-Party Beneficiary Statute, MCL 600.1405, which provides:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made **directly** to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something **directly** to or for said person. [*Schmalfeldt*, 469 Mich at 427 (emphasis added).]

The Supreme Court then examined the terms of the North Pointe Insurance Company contract, regarding its medical payments coverage:

> **COVERAGE C MEDICAL PAYMENTS**
>
> 1. Insuring Agreement.
>
> a. We will pay medical expenses as described below for bodily injury caused by an accident:
>
> (1) On premises you own or rent;
>
> (2) On ways next to premises you own or rent; or
>
> (3) Because of your operations;

Provided that:

The accident takes place in the 'coverage territory' and during the policy period;

The expenses are incurred and reported to us within one year of the date of the accident; and

The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require."

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance . . . ." [*Id.*]

In light of the policy language, the Michigan Supreme Court concluded that Schmalfeldt was, at best, an incidental beneficiary, not an intended beneficiary under the insurance contract. As noted by the Supreme Court:

> Nothing in the insurance policy specifically designates Schmalfeldt, or the class of business patrons of the insured of which he was one, as an intended third-party beneficiary of the medical benefits provision. At best, the policy recognizes the possibility of some incidental benefit to members of the public at large, but such a class is too broad to qualify for third-party status under the statute.
>
> Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under 1405. [Citation omitted]. Here, the contract primarily benefits the contracting parties because it defines and limits the circumstances under which the policy will cover medical expenses without a determination of fault. **This agreement is between the contracting parties, and Schmalfeldt is only an incidental beneficiary without a right to sue for contract benefits.** For this reason, North Pointe is entitled to summary disposition. [*Schmalfeldt*, 469 Mich at 429.] (emphasis added).

Obviously, each insurer will need to examine the terms of its contract to determine whether or not medical providers are intended beneficiaries, or only incidental beneficiaries, under the contract.

A special note on Michigan Assigned Claims Plan cases is in order at this point. In cases involving MACP claimants, there is, of course, no insurance contract to deal with. Therefore, a healthcare provider who asserts rights as a "third-party beneficiary" under a non-existent contract should immediately be the subject of a motion for summary disposition.

Alternative Theory III – Assignments

The issue of assignments came up rather frequently during oral argument before the Michigan Supreme Court on December 7, 2016. Although the author expected the Supreme Court to discuss the issue of assignments in some detail, the Court instead relegated its discussion of this issue to a footnote found on page 24 of the slip opinion. After reiterating that a healthcare provider can always seek payment from the injured person for the provider's reasonable charges, the Court noted:

> Moreover, our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. See MCL 500.3143; *Professional Rehab Assoc v State Farm Mut'l Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998) (Noting that only the assignment of future benefits is prohibited by MCL 500.3143.) [*Covenant*, Slip op at 24, fn 40.] (emphasis added).

With this caveat in mind, let us examine how this may play out in the course of a typical lawsuit.

Scenario #1: Insured Executes Assignment to a Medical Provider Prior to Settlement of a PIP Lawsuit.

Michigan courts have held that in order to create an assignment of benefits, there are no "magic words" that need to be invoked. However, in order to have a valid assignment, "the assignor must manifest an intent to transfer and must not retain any control or any power of revocation." *Burkhardt v Bailey*, 260 Mich App 636; 680 NW2d 453 (2004). Further, the assignee acquires no greater rights than the assignor had, and is subject to the same defenses. *Professional Rehab Assoc v State Farm*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

Under this scenario, the injured claimant no longer has a right to claim medical expenses incurred with any provider to whom he has executed an assignment. Such claims should not be part of the claimant's lawsuit, and the only entity that has a right to collect under the assignment is the medical provider.

Scenario #2: The Claimant Settles his Claim for Medical Expenses Through a Specific Date, but After the Settlement, the Provider Seeks to Obtain an Assignment for Medical Expenses Incurred Prior to the Settlement

Under this scenario, a medical provider would not have a valid cause of action, for the simple reason that the assignor had nothing to assign to the provider. Rather, the assignor's claims for medical expenses extinguished when the Release was signed. This scenario illustrates why it is absolutely necessary to determine precisely when an assignment was executed, and how the date of the assignment impacts on the terms of the Release.

Scenario #3: Impact of MCL 500.3143 – The Prohibition Against an Assignment of Future No-Fault Benefits

Although there have only been a couple of cases interpreting this statute, the author anticipates that there will be much more litigation as no-fault insurers examine assignments executed by their insureds to determine whether or not the insureds were assigning **future** benefits to the provider.

In *Aetna Casualty Ins Co v Starkey*, 116 Mich App 640 (1982), the insured executed an assignment prior to receiving medical treatment. The assignment purported to assign "any insurance benefits from Aetna which would become due and payable," or "any benefits which would become payable." The Court of Appeals noted that by virtue of this language, the assignment was referencing **future** no-fault benefits. Therefore, under MCL 500.3143, this assignment was void.

By contrast, in *Professional Rehab Assoc v State Farm*, 228 Mich App 167, 173 (1998), the assignment provided for:

> All of Clifford Lay's rights to be reimbursed or to have counseling services expenses paid by State Farm Mutual Automobile Insurance Company and any other insurer or self-insurer for services provided by Professional Rehabilitation Associates in connection with injuries to Clifford Lay arising out of an automobile accident.

The Court of Appeals found that this language was ambiguous because it denoted both past and future benefits. The Court noted that to the extent that this assignment pertained to benefits previously incurred, the assignment was valid. However, to the extent that it pertained to future benefits, the assignment was void. The Court went on to note that, "the failure of a distinct part of a contract does not void valid, severable provisions" and "the primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Professional Rehabilitation*, 228 Mich App at 174. When examining the date that the assignment was executed and the dates of service in question, the Court of Appeals noted that the assignment was executed after State Farm had already denied payment of the medical expenses at issue. Therefore, this was an assignment of past due benefits, which was not barred by MCL 500.3143. As a result, the provider could still maintain the cause of action against the no-fault insurer. This case illustrates why it is vitally important to obtain copies of the actual assignments and determine what date they were executed, and precisely which medical expenses the assignment was intended to encompass.

Scenario #4: The Insurance Policy Contains an Anti-Assignment Clause

Many insurance company policies contain an anti-assignment clause, which prohibits the insured from assigning a claim under the policy without the insurer's consent. Most of our insureds have never read the policy and thus may be unaware of the presence of the anti-assignment clause in the policy.

As more and more providers are expected to rely on assignments in order to further their cause of action against a no-fault insurer, it is incumbent upon the claims professionals and defense counsel to carefully examine the terms of the applicable insurance policy to see whether it contains an antiassignment clause. Given the fact that the current Michigan Supreme Court is inclined to enforce contracts as written, unless they violate public policy, the author is of the opinion that such anti-assignment clauses will be enforced by the Courts.

This caveat does not apply, of course, to MACP insurers, because once again there is simply no insurance contract at issue between the parties. Instead, the right to benefits is derived solely by statute.

Another interesting issue arises with regard to "strangers to the insurance contract." I am referring to motorcyclists, pedestrians who have no insurance of their own in the household, or employees occupying employer-furnished vehicles, and passengers in another person's automobile who do not have insurance of their own in the household. Are these individuals and their providers bound by any such anti-assignment clauses in the insurance contract? Based upon the recent Court of Appeals' decision in *Shelton v Auto-Owners Ins Co*, _ Mich App _ (2017) (Court of Appeals Docket No. 328473, rel'd 2/14/2017) and as discussed in my last article, the answer appears to be no. In *Shelton*, the Court of Appeals held that a "stranger to the contract," whose benefits are derived based solely by statute, are not bound by the anti-fraud provisions in an insurance contract. If such "strangers to the contract" are not bound by the anti-fraud clauses in the policy, by analogy they would not be bound any anti-assignment clauses in that same policy.

CONCLUSION

What will be the practical effects of *Covenant*? First, there will be no more "Covenant motions" being heard in the circuit court. Plaintiff's attorneys will no longer be obligated to show how a settlement will be apportioned between the various providers.

Second, the author expects to see a sizable amount of provider suits being dismissed on motions for summary disposition pursuant to MCR 2.116(C)(8), for failure to state a cause of action upon which relief can be granted. When responding to such motions, it will be incumbent upon the provider to show that there was a valid assignment of benefits executed by the insured, at which point the burden will shift back to the insurer to determine if such an assignment is barred by any anti-assignment clause in the insurance policy or by MCL 500.3143.

Third, it will be incumbent upon counsel on both sides of the aisle to quickly obtain copies of any assignments that were executed by the insured and to determine whether or not the assignment pertains to past due benefits or future benefits, in order to ascertain whether or not the provider has a right to maintain its cause of action against the no-fault insurer. Simply because the provider asserts that there is an assignment, in a form medical provider complaint, does not necessarily mean that it is so. Absent an assignment, the provider simply has no cause of action against the no-fault insurer.

Finally, given the Michigan Supreme Court's repeated statements that the healthcare provider's remedy, to collect an unpaid medical expense is to sue the patient, the author wonders how many medical providers would actually be willing to sue their patients? What about situations where the attorney refers their client to a particular medical provider, which proceeds to rack up five or even six figure medical expenses for questionable or even fraudulent medical treatment? Obviously, the attorney referrals to these dubious providers were made with the implicit understanding that the provider would not be suing its patient (and the referring attorney's client) to collect an unpaid medical expense, but would be suing the no-fault insurer directly. With the focus now shifting back to the healthcare provider and the patient being placed in an adversarial position regarding payment of the medical expenses, brought about as a result of an attorney referral, the author cannot help but wonder if perhaps an unintended benefit of the Michigan Supreme Court's decision will be to cut back on the number of questionable or downright fraudulent no-fault medical expense claims that, unfortunately, continue to plague the no-fault system.

Supreme Court Update

By: Mikyia S. Aaron, *Clark Hill, PLC*
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The Supreme Court Rules A Contractual Reference to "the Court" Can Only Mean the Judge and Juries Are Not Allowed to Determine the Reasonableness of Contractual Fees That Are "Fixed by the Court"

On April 14, 2017, the Michigan Supreme Court held that when parties contractually agree that the amount of reasonable attorney fees would be "fixed by a court," the parties expressly waive their right to a jury trial on the issue.

Barton-Spencer v Farm Bureau Life Ins Co, 500 Mich 32; 892 NW2d 794 (Apr. 14, 2017).

Facts: The plaintiff, an independent insurance agent, and the defendant, Farm Bureau Life Insurance Co., entered into an Agent Agreement in November 2000. The Agent Agreement provided that the defendant could seek post-litigation attorney fees and actual costs for any successful legal action taken against the plaintiff. In February 2013, the defendant terminated the plaintiff's employment for cause, alleging that the plaintiff made misrepresentations to eleven policyholders regarding the tax consequences of moving funds into a specific type of life insurance policy.

The plaintiff sued the defendant in Washtenaw Circuit Court alleging that she was terminated on the basis of her age and seeking the payment of commissions owed to her under the Agent Agreement. The plaintiff also demanded a jury trial on "all issues in this cause unless expressly waived." The defendant moved for summary judgment on the plaintiff's discrimination and breach of contract claims, which the trial court granted. The plaintiff subsequently filed an amended complaint alleging breach of the Agent Agreement. The defendant filed a counterclaim seeking the repayment of commissions earned on the eleven insurance policies the defendant refunded as a direct result of the misrepresentations made by the plaintiff.

The case proceeded to trial on the plaintiff's breach of contract claims and the defendant's counterclaim for repayment of commissions. The jury returned a verdict in favor of the defendant on plaintiff's breach of contracts claims, but found that the defendant owed the plaintiff all commissions considered to be earned at the time of her termination. The jury also returned a verdict in favor of the defendant on its counterclaim for the repayment of commissions earned on the refunded insurance policies. However, the jury did not consider the issue of attorney fees as outlined in the parties' Agent Agreement.

The defendant subsequently filed a post-judgment motion seeking contractual attorney fees and actual costs associated with the successful action against the plaintiff. The trial court granted the motion over plaintiff's objection, but deducted overlapping fees that had previously been paid from the defendant's award. Both parties appealed the trial court's post-judgment determination to the Michigan Court of Appeals. The court affirmed the jury's verdicts on the plaintiff's claims and the defendant's counterclaim, but reversed the trial court's award of contractual costs and attorney fees because it ruled that the plaintiff had a constitutional right under Article 1, § 14 of Michigan's 1963 Constitution to a jury trial regarding the reasonableness of the attorney fees and costs.

Ruling: In a unanimous opinion, the Michigan Supreme Court reversed the ruling of the Michigan Court of Appeals. The Court ruled that the Agent Agreement clearly stated that the plaintiff was to pay reasonable fees and actual costs associated with any successful legal action taken against the plaintiff by the defendant. The Court then considered whether the agreement by the parties that costs and attorney fees would be "fixed by the court" activated any right under Michigan's Constitution to

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have the reasonableness of those costs and fees determined by a jury rather than by a judge. The Court ruled that because legal opinions often use the terms "court" and "judge" interchangeably, and "[i]n ordinary parlance, the word 'court' refers to judges," the parties agreed that the amount of attorney fees and actual costs for successful litigation against the plaintiff would be fixed by a judge rather than by a jury.

The plain and unambiguous language of MCL 211.9(1)(a) provides a tax exemption for an educational organization's personal property without consideration for the organization's for-profit or non-profit status.

Practice Note: When parties contract to have the reasonableness of contractual fees determined by a "court"—which commonly refers to judges, as opposed to juries—the parties waive any right to a jury trial on the issue.

The Supreme Court Considers Black Ice as an "Open and Obvious" Danger Based on the Presence of Other Wintery Conditions on the Premises

On April 14, 2017, the Michigan Supreme Court reversed the judgment of the Michigan Court of Appeals and upheld the trial court's ruling that the presence of ice and other "wintery weather conditions" elsewhere on the premises "rendered the risk of black ice '*open and obvious*.'"

Ragnoli v North Oakland-North Macomb Imaging, Inc, 500 Mich 967; 892 NW2d 377 (2017).

Facts: Plaintiff slipped and fell in the defendant's parking lot. The trial court granted summary judgment in favor of the defendant on the grounds that the small patch of black ice the plaintiff slipped on was "open and obvious" upon casual inspection of the defendant's premises. The trial court reasoned that the weather conditions at the time of the Plaintiff's slip and fall suggested that black ice could be present. Plaintiff appealed the trial court's grant of summary judgment in favor of the defendant and the subsequent denial of the plaintiff's motion for reconsideration arguing that a lack of lighting in the defendant's parking lot prevented her from seeing the black ice. The Michigan Court of Appeals reversed the trial court's ruling by finding that the inadequate lighting in the parking lot created a question of fact as to whether the plaintiff could see the black ice upon casual inspection.

Ruling: Relying on *Hoffner v Lanctoe*, 492 Mich 450, 464 (2012), the Michigan Supreme Court reversed the ruling of the Court of Appeals. The Court agreed with the trial court that despite the low lighting evidenced in the defendant's parking lot, the presence of ice and other signs of wintery conditions elsewhere on the premises rendered the risk of a black ice patch open and obvious "such that a reasonably prudent person would foresee the danger."

The Agent Agreement provided that the defendant could seek post-litigation attorney fees and actual costs for any successful legal action taken against the plaintiff.

The Supreme Court Rules Personal Property Tax Exemption Applies to Both For-profit and Nonprofit Educational Institutions

On May 1, 2017, in a unanimous opinion, the Michigan Supreme Court held that MCL 211.9(1)(a), which exempts from taxation the personal property of charitable, educational, and scientific institutions, applies to all for-profit and nonprofit educational institutions that meet the requirements specified in the statute.

SBC Health Midwest, Inc v City of Kentwood, ___ Mich ___; 894 NW2d 535 (2017) (Docket No. 151524).

Facts: SBC Health Midwest, Inc. ("SBC Health"), a Delaware for-profit corporation that operated Sanford-Brown College Grand Rapids, requested a tax exemption under MCL 211.9(1)(a) for personal property used to operate the college. However, the city of Kentwood ("Kentwood") denied the tax exemption request. SBC Health then appealed Kentwood's denial of the tax exemption to the Tax Tribunal. The Tax Tribunal again denied SBC Health Midwest's claim on the grounds that MCL 211.9(1)(a) only provides a property tax exemption to nonprofit education institutions. The Tax Tribunal relied on the language of MCL 211.7n, a statute that specifically exempted the taxation of a non-profit educational institution's personal property.

SBC Health then appealed the Tax Tribunal's judgment to the Michigan Court of Appeals, which reversed the Tax Tribunal's ruling in an unpublished opinion issued March 19, 2015. In its decision to reverse the Tax Tribunal, the Court of Appeals reasoned that the unambiguous language of MCL 211.9(1)(a) provides a tax exemption for the personal property of an educational institution without consideration of the institution's for-profit or nonprofit status. The Michigan Court of Appeals remanded the case back to the Tax Tribunal to determine whether SBC Health met the other requirements for the property tax exemption in MCL 211.9(1)(a). The Michigan Supreme Court granted Kentwood's application for leave to appeal the Court of Appeals' reversal of the Tax Tribunal's ruling.

Ruling: The Michigan Supreme Court affirmed the judgment of the Court of Appeals. The Court agreed with the Court of Appeals that the unambiguous language of the statute did not prevent a for-profit educational institution from claiming the personal property tax exemption provided by MCL 211.9(1)(a). The Court began its analysis by reviewing the statutory language, which the Court ruled unambiguously applied to the personal property of educational institutions generally. The Court further acknowledged that absent from the relevant statute was any language limiting the personal property tax exemption to non-profit educational institutions. Finally, the Court considered the statutory content of MCL 211.7n, which the Michigan Legislature had expressly limited the personal property tax exemptions to nonprofit institutions. Relying on the rules of statutory

interpretation, the Court ruled that the legislative intent behind MCL 211.9(1)(a) was not to limit the personal property tax exemption to nonprofit educational institutions. The Court reasoned that the express limitations to nonprofit institutions evidenced in MCL 211.7n and the absence of such language in MCL 211.9(1)(a) shows the Michigan Legislature's intent to apply the tax exemption to both nonprofit and for-profit institutions that met the other requirements of the statute. Accordingly, the Court concluded that the Legislature intentionally failed to limit MCL 211.9(1)(a)'s tax exemption to non-profit educational institutions was intentional. The Court remanded the case back to the Tax Tribunal to determine whether SBC Health met the other requirements for the personal property tax exemption.

Practice Note: The plain and unambiguous language of MCL 211.9(1)(a) provides a tax exemption for an educational organization's personal property without consideration for the organization's for-profit or non-profit status.

MDTC Schedule of Events

2017

September 8	Golf Outing - Mystic Creek Golf Club
Sept 27-29	SBM – Annual Meeting – Cobo Hall, Detroit
September 27	SBM Awards Banquet - Respected Advocate Award
October 4-8	DRI Annual Meeting – Sheraton, Chicago
November 9	MDTC Board Meeting – Sheraton, Novi
November 9	Past Presidents Dinner – Sheraton, Novi
November 10	Winter Conference – Sheraton, Novi

2018

February 2	Future Planning – Crowne Plaza Downton Riverfront Detroit
March 8	Legal Excellence Awards - Gem Theatre, Detroit
May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
September 14	Golf Outing – Mystic Creek
October 4	Meet the Judges - Sheraton Detroit Novi, Novi
October 17-21	DRI Annual Meeting - Marriott, San Francisco
November 8	MDTC Board Meeting – Sheraton, Novi
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Conference – Sheraton, Novi

Amicus Report

By: Kimberlee A. Hillock, *Willingham & Coté, P.C.*

In every case that the MDTC has participated as amicus at the application stage in 2016, the Michigan Supreme Court has either granted leave to appeal, granted mini oral argument on the application, or has taken some sort of action other than denying leave to appeal. When leave to appeal is granted in approximately only three percent of appeals, this says something about the quality of our amicus writers who volunteer their time to support MDTC's mission and members. I would like to recognize each author who has done so:

- *Spectrum v Westfield*,[1] Paul A. McDonald and Jennifer Anstett with Magdich Law, PC
- *Nexteer v Mando*,[2] Phil DeRosier with Dickinson Wright, PLLC
- *Lowery v Enbridge*,[3] Mary Massaron with Plunkett Cooney
- *Estate of Simpson v Pickens*,[4] Irene Bruce-Hathaway with Miller Canfield Paddock & Stone, PLC
- *Covenant v State Farm*,[5] Nicolas Ayoub with Hewson & Van Hellemont PC
- *Iliades v Dieffenbacher North America, Inc*,[6] Irene Bruce-Hathaway with Miller Canfield Paddock & Stone, PLC
- *Estate of Skidmore v Consumers Energy Co*,[7] Carson Tucker
- *Jendrusina v Mishra*,[8] Kimberlee Hillock with Willingham & Coté, PC
- *Haksluoto v Mt Clemens Regional Med Cente,r*[9] Nicolas Ayoub with Hewson & Van Hellemont PC

While not every appeal has survived after oral argument, perhaps the most successful appeal supported so far has been *Covenant*. Before *Covenant*, independent suits by medical providers against no-fault insurance carriers were becoming a huge problem. One motor vehicle accident was giving rise to multiple suits, some filed in district court, some filed in circuit court, and often filed in different counties. The potential for forum shopping and different outcomes was rampant. In what may be one of the most highly anticipated opinions of the term, the *Covenant* majority held that a healthcare service provider lacks standing or an independent right of action to pursue collection of personal protection insurance (PIP) benefits directly from its patient's automobile no-fault insurance carrier:

The Court of Appeals' opinion in this case is premised on the notion that an injured person's healthcare provider has an independent statutory right to bring an action against a no-fault insurer for payment of no-fault benefits. This premise is unfounded and not supported by the text of the no-fault act. A healthcare provider possesses no statutory cause of action under the no-fault act against a no-fault insurer for recovery of PIP benefits. Plaintiff therefore has no statutory entitlement to proceed with its action against defendant.[10]

The MDTC Amicus Committee cannot make a difference unless we have volunteer writers. Recently, two requests for amicus support were received and approved, but no writer could be found. The Amicus Committee needs you! If you are interested in volunteering as an amicus writer, please contact me at khillock@willinghamcote.com.

Endnotes

1. Michigan Supreme Court Docket No. 151419.
2. Michigan Supreme Court Docket No. 153413.
3. Michigan Supreme Court Docket No. 151600.
4. Michigan Supreme Court Docket No. 152036.
5. Michigan Supreme Court Docket No. 152758.
6. Michigan Supreme Court Docket No. 154358.
7. Michigan Supreme Court Docket No. 154030.
8. Michigan Supreme Court Docket No. 154717.
9. Michigan Supreme Court Docket No. 154723.
10. *Covenant, supra, slip op* at 25.

Kimberlee A. Hillock is a shareholder and the chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk for the Honorable Donald S. Owens of the Michigan Court of Appeals, and as a judicial clerk for the Honorable Chief Justice Clifford W. Taylor of the Michigan Supreme Court. Since joining Willingham & Coté P.C., in 2009, Ms. Hillock has achieved favorable appellate results for clients more than 60 times in both the Michigan Court of Appeals and the Michigan Supreme Court. She has more than 14 years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild.

MDTC Member Victories

MDTC members are among the best and most talented attorneys in Michigan. In this section, we highlight significant victories and outstanding results that our members have obtained for their clients. We encourage you to share your achievements. From no-cause verdicts to favorable appellate decisions and everything in between, you and your achievements deserve to be recognized by your fellow MDTC members and all of the *Michigan Defense Quarterly*'s readers.

Summary Judgment--Patrick Aseltyne and Andrew Brege, *Johnson, Rosati, Schultz & Joppich, P.C.*

In late March, a federal judge granted summary judgment to the Midland County defendants in an in-custody death case. MDTC members, **Patrick Aseltyne and Andrew Brege**, successfully represented the defendants on behalf of **Johnson, Rosati, Schultz & Joppich, P.C.** Mr. Aseltyne and Mr. Brege work in the firm's Lansing office and have over 45 years of combined litigation experience.

The case *Marden v Midland County, et al.*, arose out of the tragic death of Brian "Jack" Marden on February 13, 2015. Marden was arrested for assault and aggravated assault resulting from a domestic dispute. When the Midland County Jail employees observed Marden's deteriorating mental health, they removed him from his cell for an interview with Community Mental Health representatives. Marden first became threatening with the social workers and then aggressive with the officers while being escorted back to his cell. Video footage shows Marden continued to act erratically while alone in his cell; he removed his jumpsuit and proceeded to smear himself and his surroundings with urine and feces. The officers entered the cell, and a nurse administered an IM injection without apparent effect. After several minutes of struggling to subdue Marden, officers placed a spit hood on him and, at the direction of the nurse, put him in a restraint chair. When Marden lost consciousness, the officers immediately removed his restraints and performed CPR until an ambulance transported him to the MidMichigan Medical Center. It was determined that Marden was in acute cardiac pulmonary arrest, and he died two days later.

Marden's estate filed the lawsuit in the Eastern District of Michigan, alleging violations of the Fourth, Eighth, and Fourteenth Amendments pursuant to 42 USC 1983; the plaintiff also asserted state law assault and battery claims, and liability against the County of Midland pursuant to *Monell v Department of Social Services of New York*, 436 US 658 (1978). In addition to the County of Midland, the complaint named five officers in their individual capacities.

In a motion for summary judgment, defense counsel argued that the individual defendants were entitled to qualified immunity. With respect to the Fourth and Fourteenth Amendment excessive force claims, Judge Thomas L. Ludington agreed that the officers did not violate any clearly established constitutional right in their use of force or by failing to intervene. The court also granted defendants' motion on the Fourteenth Amendment claim of deliberate indifference to a pretrial detainee's medical needs; the plaintiff failed to establish that the use of the spit hood was a *per se* unreasonable risk, exacerbated Marden's medical conditions, or violated any clearly established constitutional right. Similarly, the officers were entitled to immunity on the assault and battery claims. Finally, the court held that the section 1983 claims against the County were without merit because there was no evidence of an illegal policy, practice, or custom at the Midland County Jail.

To share an MDTC Member Victory, please send a summary to Victoria Convertino at vconvertino@jrsjlaw.com.

Meet the MDTC Leaders

A key component of MDTC's mission is facilitating the exchange of views, knowledge, and insight that our members have obtained through their experiences. That doesn't happen without interaction. And interaction doesn't typically happen until you've been introduced. So, in this section, we invite you to meet the new (and, possibly, some not-so-new) MDTC leaders who have volunteered their time to advance MDTC's mission.

MEET: Barbara Hunyady
Flint Regional Chair
MDTC Member since 2006
Cooley Law School – 10 years of experience.
Law Firm: Cline, Cline & Griffin, Associate

Q: *Why did you become involved in MDTC?*
A: Initially to impress one of the partners who is a founding member, but after joining I wanted to continue attending the conferences and meeting more defense attorneys.

Q: *What inspired you to become an MDTC Leader?*
A: I know all organizations need people to lend their time so they can grow and stay strong. When I was told there was an opening for the Flint area chair, I wanted to do my part.

Q: *How would you describe your leadership style?*
A: I see myself as a visionary and motivator. I like to keep an eye out for improvements, question "this is how we have always done it," and am not afraid to get my hands dirty to get things done.

Q: *How has your MDTC involvement enhanced your personal/professional life?*
A: It has given me access to defense oriented seminars and given me connections to colleagues that I otherwise would not have had.

Q: *Why would you encourage other MDTC members to seek leadership roles?*
A: As compared to other leadership roles I have had with other groups, MDTC is not as overwhelming and Madelyne is always very helpful. The board was forthcoming about expectations and time commitment, so you will know what you are signing up for. As a bonus, you contribute to the growth of a great organization.

Q: *Are you involved in other organizations or activities?*
A: I am active in my local bar association, my hometown FFA (Future Farmers of America) organization for high school students, and church. In my spare time, I wrench with my husband on our racecar which he drives at dirt oval tracks primarily in Michigan and occasionally in Iowa, New York, and Wisconsin. Additionally, I am slated to be on the board for the YWCA of Flint.

Q: *If you weren't a legal professional, what type of career would you choose?*
A: I would be a crop farmer and agriculture advocate.

Q: *What advice do you have to new MDTC members? To new attorneys?*
A: Use your resources and seek out advice when you need it. There is a wealth of experience and knowledge in our bar. I have never had any attorney refuse to offer me advice when I have asked. Being professional and courteous has opened a lot of doors and given me advantages that have in turn benefitted my clients.

SAVE THE DATE

MDTC Future Planning Meeting

Friday, February 2, 2018

Crowne Plaza
8:00 a.m. – 3:00 p.m.
2 Washington Blvd, Detroit, MI 48226

MEMBER NEWS

Work, Life, and All that Matters
Supreme Court Decision Aligns with DRI Brief in *Microsoft v. Baker*

The June 12th decision of the U.S. Supreme Court in *Microsoft v. Baker* aligns with DRI's amicus brief. The case involves the legitimacy of plaintiff tactics in securing interlocutory review of an adverse class certification decision. The DRI brief was submitted through its Center for Law and Public Policy.

Brief co-authors Hilary Ballentine and Mary Massaron of Plunkett Cooney (Bloomfield Hills, MI) are available for interview or expert comment through DRI's Public Policy Office.

In 2007, Xbox 360 console owners filed five actions alleging their Xbox 360 consoles had a propensity to scratch game discs. Plaintiffs sought recovery for breach of warranty, as well as for violation of state consumer protection acts. After sixteen months of discovery, the district court denied class certification. The court found individual issues of causation and damages foreclosed certification, particularly given that fewer than 0.4% of Xbox 360 owners even reported disc scratching. The Ninth Circuit denied a petition for review, the parties settled on an individual basis, and the case was dismissed.

In 2011, however, the same lawyers as in the original lawsuit filed a new action on behalf of different plaintiffs, making the exact same allegations -- but claiming the law on class certification had changed, now permitting class certification. The district court granted Microsoft's motion to strike the class allegations, finding the reasoning in the initial class certification denial persuasive and holding that nothing in recent case law undermined the earlier court's causation analysis. The Ninth Circuit again denied plaintiffs' petition seeking review.

But rather than prosecute their individual claims to final judgment in the district court, the plaintiffs responded by voluntarily dismissing with prejudice and filing a notice of appeal from the dismissal. The Ninth Circuit, in the reported decision identified above, found it had jurisdiction over the appeal from the voluntary dismissal under its recent decision in *Berger v. Home Depot USA, Inc*. It then addressed the merits of the order striking the class allegations and reversed, holding that Rule 23 allows classes to be certified on warranty claims when plaintiffs characterize their claims as turning on common factual questions about the alleged existence of a defect.

The Supreme Court opinion reverses the Ninth Circuit's March 2015 ruling that plaintiffs who were previously unsuccessful in obtaining interlocutory appellate review of class certification denial under Federal Rule of Civil Procedure 23(f) could obtain a second chance at an interlocutory appeal of the certification order simply by voluntarily dismissing their case with prejudice under Rule 41(a) and then appealing that ruling. DRI argued in its *amicus curie* that such a tactic ignores the effect of a dismissal with prejudice, runs directly afoul of the discretion vested with the appellate courts to hear interlocutory certification appeals, and distorts the balance of the civil justice system. DRI also argued that this tactic, which infringes entirely on the final judgment rule, 28 U.S.C. § 1291, would promote piecemeal appeals, "especially when one considers how plaintiffs could use this tactic to obtain review of the many interlocutory orders entered in the typical case outside the class action context."

The Supreme Court's decision reversing the Ninth Circuit's decision expressly notes the concerns raised in DRI's amicus brief. In particular, Justice Ruth Bader Ginsburg, writing for the Supreme Court, observed as follows:

> "The tactic would undermine § 1291's firm finality rule, designed to guard against piece-meal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." (Opinion, p 2).

Under Justice Thomas' concurrence (in which Chief Justice Roberts, Jr. and Justice Alito joined), the lack of jurisdiction over respondents' appeal was better grounded in Article III of the Constitution (rather than

§ 1291), which limits the jurisdiction of the federal courts to issues presented "in an adversary context[.]"(Concurrence, p 2). In light of the voluntary dismissal, the concurrence opined that the parties "consented to the judgement against them" and thus "were no longer adverse to each other on any claims[.]" (*Id.*).

"We are delighted that the Supreme Court adopted the position advanced by DRI," said Mary Massaron of Plunkett Cooney, Bloomfield Hills, MI, who co-authored DRI's amicus brief. "The Court's decision restores the careful balance of the civil justice system, which was distorted by the Ninth Circuit's incorrect decision."

David C. Anderson Elected Commissioner of the State Bar of Michigan

Collins Einhorn Farrell PC, a leading defense litigation firm, is pleased to announce that our partner David C. Anderson has been elected to the board of commissioners of the State Bar of Michigan. The State Bar Board of Commissioners provides oversight to the various operations of the State Bar, such as finance, public policy, professional standards, and member services and communications. Anderson will represent District I (Oakland County), serving for a three-year term expiring at the close of the 2020 Annual Meeting.

A shareholder at Collins Einhorn Farrell, Anderson has practiced for nearly two decades, defending a wide variety of professional liability claims ranging from legal malpractice to claims against accountants, insurance agents, and real estate appraisers. He has also successfully defended numerous corporations against product liability claims, including claims involving wrongful death and serious personal injury.

Anderson has made a notable impact through his diligent service to the bar, contributing his time to a number of legal associations and groups, including having previously served as an

appointee on the State Bar's Character and Fitness Committee. He is also the immediate past president of the Oakland County Bar Association and has served on the OCBA Board of Directors for the better part of the last 11 years.

Anderson is an AV-preeminent rated attorney, has been listed by Super Lawyers® since 2008, and in 2016 he was listed "Lawyer of the Year" in Metro Detroit for the defense of legal malpractice cases by Best Lawyers©. Anderson was also recognized as a "Leader in the Law" by *Michigan Lawyers Weekly* in 2016, and received the Michigan Defense Trial Counsel's Golden Gavel Award in 2007.

Anderson earned his undergraduate degree from the University of Michigan (with honors) and his law degree from Detroit Mercy School of Law.

Collins Einhorn Farrell PC Partner Kari L. Melkonian is Elected to Board of Directors for the Oakland County Bar Association

Collins Einhorn Farrell PC proudly announces the election of its partner **Kari L. Melkonian** to the Board of Directors for the Oakland County Bar Association (OCBA). Melkonian will be serving a three year term beginning June 1, 2017.

Melkonian has been actively involved in the OCBA since 2008, and serves on a number of committees within the association. She is the present Chair of the Circuit Court Committee, and is a member of the Energy, Sustainability and Environmental Law Committee, the Inns of Court Committee, the New Lawyers Committee, the Family Law Committee, and the OCBA Mentor Program. Melkonian is a past Chair of the Criminal Law Committee, and a past member of the OCBA Board of Directors Nominating Committee. Melkonian is also actively involved in a number of other organizations, including her role as Co-Chair of the Michigan Defense Trial Counsel's Social Media Committee.

Melkonian focuses her practice on the defense of general and automotive liability claims, and has substantial experience in all phases of litigation, including discovery, dispositive motion practice and trial. She has been listed a "Rising Star" by Super Lawyers® Magazine since 2016. She is a past recipient of the Oakland County Circuit Court MVP Award (2010) and the 10-Year Service Award from Oakland County for her public service.

Ms. Melkonian is a graduate Oakland University. She obtained her Juris Doctor from the University of Detroit Mercy School of Law in 2008.

Member News *is a member-to-member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

JOIN AN MDTC SECTION

All MDTC members are invited to join one or more sections. All sections are free. If you are interested in joining a section, email MDTC at Info@mdtc.org and indicate the sections that you would like to join. The roster of section chair leaders is available on the back of the *Quarterly*.

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Commercial Litigation
General Liability
Insurance
Labor & Employment
Law Practice Management
Municipal & Government Liability
Professional Liability & Health Care
Trial Practice
Young Lawyers

MEMBER TO MEMBER SERVICES

This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email Michael.Cook@ceflawyers.com**.

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I am one of six Michigan members of the American Academy of Appellate Lawyers, and have litigated more than 500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

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